DOCKET

(21)

No. 83-1545-CFX
Status: GRANTED

Title: Western Air Lines, Inc., Petitioner
v.
Charles G. Criswell, et al.

Docketed:
March 16, 1984

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Kennedy,William John, Booth Jr.,Gordon Dean

Counsel for respondent: Fay,Raymond C.

Entry	Date	Note	Proceedings and Orders
1	Mar 16 1984	G	Petition for writ of certiorari filed.
2	Mar 16 1984		Appendix of petitioner Western Air Lines, Inc. filed.
3	Apr 23 1984		Brief of respondents Charles G. Criswell, et al. in opposition filed.
4	Apr 25 1984		DISTRIBUTED. May 10, 1984
5	May 1 1984	X	Reply brief of petitioner Western Air Lines, Inc. filed.
6	May 14 1984	P	The Solicitor General is invited to file a brief in tr case expressing the views of the United States.
7	Aug 27 1984		Brief amicus curiae of United States filed.
8	Aug 29 1984		REDISTRIBUTED. September 24, 1984
9	Oct 1 1984		The petition for a writ of certiorari is granted limit to Questions 2 and 3 presented by the petition.
10	Nov 14 1984		Brief amicus curiae of Air Line Pilots Assn.,International filed.
11	Nov 15 1984		Brief amicus curiae of Delta Air Lines, Inc. filed.
12	Nov 15 1984		Brief of petitioner Western Air Lines, Inc. filed.
13	Nov 15 1984		Brief amicus curiae of American Airlines, Inc. filed.
14	Nov 15 1984		Brief amicus curiae of Equal Employment Advisory Council filed.
15	Nov 15 1984		Brief amicus curiae of Pan American World Airways, Inc. filed.
16	Nov 15 1984		Brief amicus curiae of Trans World Airlines, Inc. filed.
17	Nov 23 1984	G	Motion of the Solicitor General for leave to particip in oral argument as amicus curiae and for divided argument filed.
18	Dec 3 1984		Motion of the Solicitor General for leave to particip in oral GRANTED.
19	Dec 4 1984		SET FOR ARGUMENT. Monday, January 14, 1985. (3rd case)
20	Dec 10 1984		CIRCULATED.
21	Dec 15 1984	X	Brief amicus curiae of American Assn. of Retired Persons filed.
22	Dec 18 1984	X	Brief amicus curiae of Flight Engineers International Assn filed.
23	Dec 19 1984	X	Brief amicus curiae of United States, et al. filed.
24	Dec 20 1984	X	Joint appendix filed.
25	Dec 19 1984	X	Brief of respondents Charles G. Criswell, et al. filed.
26	Dec 19 1984	X	Brief amicus curiae of Natl. Council on the Aging, Inc., et al. filed.

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App

No. 83-1545-CFX

Entry	Date	Note	Proceedings and Orders
27	Dec 19 1984	X	Brief amicus curiae of American Civil Liberties Union, et al. filed.
28	Dec 31 1984		Record filed.
29	Dec 31 1984		Record filed.
30	Jan 7 1985	X	Reply brief of petitioner Western Air Lines, Inc. filed.
31	Jan 14 1985		ARGUED.

PETITION FOR WRIT OF CERTIORARI

83-1545

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No. ..-....

IN THE

Supreme Court of the United States

October Term, 1983

WESTERN AIR LINES, INC.,

Petitioner,

vs.

CHARLES G. CRISWELL, ALBERT RON and RULON H. STARLEY,

Respondents.

WESTERN AIR LINES, INC.,

Petitioner,

vs.

WESTCOT B. STONE, III, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Questions Presented.

1. When the validity of an ADEA §4(f)(2) seniority system exemption defense turns upon disputed interpretations of an airline employer's collectively bargained seniority system, what deference must be given by a trial jury to the interpretation made of that seniority system by the arbitration tribunal designated by the Railway Labor Act to resolve such interpretation disputes?

2. Where the employee establishes a prima facie case under the ADEA, does the burden of persuasion (in addition to the burden of articulating a non-discriminatory reason) shift to the employer to prove that the determining cause was a reasonable factor other than age (*i.e.*, that age was *not* the determining factor)?

3. Where an airline, pursuant to a federally recognized responsibility to operate "with the highest possible degree of safety in the public interest," imposes an age 60 BFOQ upon Second Officers (flight engineers), what standards govern the review of that BFOQ by a trial jury evaluating an ADEA §4(f)(1) defense?

4. Where an airline employer has sustained the burden of proving that age discrimination (*i.e.*, an age 60 BFOQ for flight engineers) is reasonably necessary to protect public safety, is it "harmless error" to then instruct the jury to find a violation of the ADEA if it finds the reasons justifying the BFOQ itself to be a "pretext" for the age discrimination admitted and found justifiable as a BFOQ?

Parties.

Western Air Lines, Inc. is a Delaware corporation. The plaintiffs in the *Criswell* case are Charles G. Criswell, Rulon H. Starley and Albert Ron. The *Stone* action is a class action which presently has 12 plaintiff members in the class: Westcot B. Stone, III, Robert L. Butler, Norval P. Cavett, Jack R. Dean, Brentnall J. Higgs, Alan J. McLaren, Bill H. Pelton, Albert J. White, Henry J. Wiegand, Eugene R. Black, Neil S. Foster, and Jack L. Keyes. Plaintiffs Ron in *Criswell* and White in *Stone* were "career" Second Officers with Western when they reached age 60. The remaining plaintiffs were employed by Western as DC-10 Captains when they reached age 60 and were required to retire. Airline Pilots Association International (ALPA) is the representative of Western pilots under the Railway Labor Act. ALPA is not a party in *Criswell*, and is a third-party defendant in *Stone*.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties	ii
Opinions Below	2
Jurisdiction	2
Statutes and Regulations Involved	2
Statement of the Case	2
1. Pilot Jobs Involved Herein	3
2. The FAA Age 60 Rule	4
3. Impact of 1978 ADEA Amendments	4
4. Pilot Demands Prior to Suit	5
5. Proceedings Below — Criswell	6
6. Proceedings Below — Stone	7
Reasons for Granting the Writ	10
I. This Case Involves a Question Recently Recognized by This Court as Being Important to the Administration of the Seniority System Exemption From the ADEA Concerning Whether a Court or Jury May Subvert the Exemption by Giving a Collectively Bargained Seniority System an Interpretation Contrary to That Given It by the Railway Labor Act	10
II. The Decision Below Is in Conflict With the Decisions of Other Courts of Appeals Respecting the Nature of the Evidentiary Burden Placed Upon an Employer in a Suit Brought Under the ADEA Where the Claim Is That the Job Action Was Based on Reasonable Factors Other Than Age	14

Page

III.

A Conflict Exists Among the Circuits as to the Standards Which Should Be Applied by a Trial Court or Jury in Overruling a Discriminatory Job Restriction Imposed to Preserve Public Safety 16

IV.

This Decision Creates a Conflict With Other Circuits Regarding the Significance of Pretext in Nullifying an Employment Restriction Otherwise Justified by Public Safety Considerations 23

Conclusion 25

INDEX TO APPENDICES

Opinion of the Ninth Circuit; Filed 6/28/83 ..... App. p. A1

Memorandum Opinion of District Court; Filed 5/12/81 ..... A31

Final Judgment and Permanent Injunction; Filed 5/12/81 ..... A54

Correction of Final Judgment and of Memorandum Opinion; Filed 5/13/81 ..... A59

Memorandum Decision and Order Re Attorneys Fees; Filed 11/3/81 ..... A60

Findings of Fact and Conclusions of Law, Filed April 25, 1979 ..... A67

Amended Findings of Fact and Conclusions of Law, Filed September 11, 1979 ..... A74

Order, Filed September 11, 1979 ..... A82

Order of the Ninth Circuit; Filed 12/20/83 ..... A83

System Board Decision; Dated November 1978 ..... A84

Dissenting Opinion, Re: ALPHA Case No. WAL-5-78 ..... A92

Page

Memorandum Decision and Order A95

Memorandum Opinion and Order A101

Memorandum Order of Preliminary Injunction A112

Statutes and Regulations Involved A118

TABLE OF AUTHORITIES

Cases — Page

Air Line Pilots Ass'n v. Trans World Airlines, Inc., 713 F.2d 940 (2nd Cir., 1983) cert. granted sub nom. TWA v. Thurston, et al., No. 83-997 (February 27, 1984) 5, 8, 10, 17

Aldendifer v. Continental Air Lines, Inc., 650 F.2d 171 (9th Cir., 1981) 5, 6

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 12

American Tobacco Co. v. Patterson, 456 U.S. 63 (1982) 10, 11

Andrews v. Louisville & Nashville R. Co., 406 U.S. 320 (1972) 13

Arritt v. Grisell, 567 F.2d 1267 (4th Cir. 1977) 20

Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981) 12, 13

Burwell v. Eastern Air Lines, Inc., 633 F.2d 361 (4th Cir. en banc, 1980), cert. den. 450 U.S. 965 (1981) 22, 24

Criswell v. Western Air Lines, Inc., 514 F.Supp. 384 (C.D. Cal. 1981) 2, 6, 7, 8, 9, 11, 17, 18, 20, 22

DeSollar v. Hanscomb, 158 U.S. 216 (1895) 24

Dothard v. Rawlinson, 433 U.S. 321 (1977) 16

Douglas v. Anderson, 656 F.2d 528 (9th Cir., 1981) 15

E.E.O.C. v. County of Los Angeles, 706 F.2d 1039 (9th Cir., 1983) cert. den. ___ U.S. ___ (1984) 20

E.E.O.C. v. County of Santa Barbara, 666 F.2d 373 (9th Cir., 1980) 20

E.E.O.C. v. U. of Texas Health Science Center, 710 F.2d 1091 (5th Cir., 1983) 20, 24

Page

E.E.O.C. v. Wyoming, 103 S.Ct. 1054 (1983) 18

Elgin, J. & E. R. Co. v. Burley, 325 U.S. 711 (1945) 13

Harriss v. Pan American World Airlines, 649 F.2d 670 (9th Cir., 1980) 22

Hodgson v. Greyhound Lines, 449 F.2d 859 (7th Cir., 1974), cert. den. 419 U.S. 1122 (1974) 19

Hoefelman v. Conservation Commission of Missouri, 718 F.2d 281 (8th Cir., 1983) 21

Johnson v. American Airlines, Inc., 18 Av. Cas. 17,177 (N.D. Tex. 1983) appeal pending (5th Cir.) 21

Keating v. Federal Aviation Administration, 610 F.2d 611 (9th Cir., 1979) 4, 17

Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir., 1979) 15

Monroe v. United Air Lines, Inc., 31 EPD ¶33,329 (1982) 22

Murnane v. American Airlines, Inc., 667 F.2d 98 (D.C. Cir., 1981), cert. den. 456 U.S. 915 (1982) 19, 21

Orzel v. City Wauwatosa Fire Dep't., 697 F.2d 743 (7th Cir., 1983), cert. den., ___ U.S. ___ (1983) 20, 22, 23, 24

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 11

Sledge v. J. P. Stevens & Co., Inc., 585 F.2d 625 (4th Cir., 1978), cert. denied, 440 U.S. 981 (1979) 11

Smallwood v. United Air Lines, 661 F.2d 303 (4th Cir., 1981), cert. den. 456 U.S. 1007 (1982) 21

Smith v. University of North Carolina, 632 F.2d 316 (4th Cir., 1980) 15

Starr v. Federal Aviation Administration, 589 F.2d 307 (7th Cir., 1978) 17

Page

Stone v. Western Air Lines, Inc., 544 F.Supp. 33 (C.D. Cal. 1982) 2, 7, 8, 9, 22
Teamsters v. United States, 431 U.S. 324 (1977) 11
Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) 15
Tuohy v. Ford Motor Co., 675 F.2d 842 (6th Cir., 1982) 18, 21
Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) 11
United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977) 11
United Airlines, Inc. v. McMann, 434 U.S. 192 (1977) 5, 6
Usery v. Tamiami Trail Tours, 531 F.2d 224 (5th Cir., 1976) 17, 19, 20, 22, 23
World Airways v. Internat. Broth. Etc., 578 F.2d 800 (9th Cir., 1978) 16
W.R. Grace and Co. v. Local Union 759, ___ U.S. ___, 103 S.Ct. 2177 (1983) 13
Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982) 20

Federal Register

24 Federal Register, pp. 9776-9778 (1959) 16
44 Federal Register, p. 37974 17

Federal Regulations

Code of Federal Regulations, Title 14, Sec. 121.383(c) 2, 4, 16
Code of Federal Regulations, Title 14, Sec. 121.385(b) 17
Code of Federal Regulations, Title 29, Sec. 860.102 ..... 2, 17

Page

Miscellaneous

Public Law 95-256, 92 Stat. '89 5
Public Law 96-171 (Dec. 29, 1979) 93 Stat. 1285 16

Statutes

Age Discrimination in Employment Act of 1967, Sec. 2 (29 U.S.C. §§621 et seq.) 2, 3
Age Discrimination in Employment Act of 1967, Sec. 4 (29 U.S.C. §§623 et seq.) 2
Age Discrimination in Employment Act of 1967, Sec. 4(a) (29 U.S.C. §623(a)) 6, 7
Age Discrimination in Employment Act of 1967, Sec. 4(f) (29 U.S.C. §623(f)) 2
Age Discrimination in Employment Act of 1967, Sec. 4(f)(1) (29 U.S.C. §623(f)(1)) ..... i, 5, 16
Age Discrimination in Employment Act of 1967, Sec. 4(f)(2) (29 U.S.C. §623(f)(2)) .... i, 5, 10, 11, 12, 14
Age Discrimination in Employment Act of 1967, Sec. 7 (29 U.S.C. §626) 3
Federal Aviation Act of 1958, Sec. 601 (49 U.S.C. §§1421 et seq.) 3
Federal Aviation Act of 1958, Sec. 601(b) (49 U.S.C. §1421(b)) 2, 16
Railway Labor Act, Sec. 204 (45 U.S.C. §184) 2, 3, 6, 13
United States Code, Title 28, Sec. 1254(1) 2
United States Code, Title 42, Sec. 2000e-2(e) 16
United States Code, Title 45, Secs. 151, et seq. 3
United States Code, Title 45, Sec. 153 First (q) 6
United States Code, Title 45, Sec. 153(r) 6

No. ..-....

IN THE

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October Term, 1983

WESTERN AIR LINES, INC.,

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vs.

CHARLES G. CRISWELL, ALBERT RON and RULON H. STARLEY,

Respondents.

WESTERN AIR LINES, INC.,

Petitioner,

vs.

WESTCOT B. STONE, III, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Western Air Lines, Inc. ("Western"),* petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

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*Western has no parent company, no subsidiary that is not wholly owned and no affiliate.

OPINIONS BELOW.

The opinion of the court of appeals (A-1, *infra*) is officially reported at 709 F.2d 544. The district court rendered two opinions in *Criswell et al. v. Western Air Lines, Inc.* The first (A-31, *infra*) is officially reported at 514 F.Supp. 384. The second (A-60, *infra*) is not officially reported. The district court in *Stone v. Western Air Lines, Inc.*, rendered a first interlocutory opinion not officially reported (A-95). A second opinion (A-101) issued after the interlocutory appeal herein is officially reported at 544 F.Supp. 33.

JURISDICTION.

The judgment of the court of appeals was entered on June 28, 1983. Western's petition for rehearing which was timely filed was denied on December 20, 1983 (A-83.) This petition is filed within 90 days of the date of the denial of rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED.

The federal statutes and regulations involved are (1) the Age Discrimination in Employment Act of 1967 ("ADEA"), as amended in 1978, 29 U.S.C. §§623, *et seq.*, and §4(f) (29 U.S.C. §623(f)) in particular; Section 204 of the Railway Labor Act, 45 U.S.C. §184; Section 601(b); §121.383(c) of the Federal Aviation Regulations ("the FAA's Age 60 Rule"), 14 C.F.R. §121.383(c); and former ADEA regulation 29 C.F.R. §860.102 (approving the Age 60 Rule as a BFOQ for pilots). The full text of these materials is set forth in the Appendix (A-118.)

STATEMENT OF THE CASE.

These are actions by airline pilot employees of Western brought under the Age Discrimination in Employment Act ("The ADEA"), 29 U.S.C. §§621, *et seq.*, challenging

Western's right to require that they retire at age 60. The basis for subject matter jurisdiction in the district court was ADEA §7, 29 U.S.C. §626.

Western is a federally certificated air carrier engaged in international and domestic carriage by air of passengers, property and mail. From the standpoint of safety of flight, it is governed by Title VI of the Federal Aviation Act of 1958, 49 U.S.C. §§1421, *et seq.*, and the rules and regulations of the Federal Aviation Administration (the FAA) promulgated thereunder. In labor relations, it is governed by the applicable provisions of the Railway Labor Act, 45 U.S.C. §§151, *et seq.*

1. Pilot Jobs Involved Herein.

The pilots in Western's employ (Captains, First Officers, and Second Officers) comprise a single bargaining unit under a 1961 "craft or class" decision of the National Mediation Board. The representative of Western's pilots under the Railway Labor Act is ALPA. The terms and conditions of employment of Western's pilots are prescribed in collective bargaining agreements negotiated over the years by and between Western and the pilots in its service, as represented by ALPA. The basic working agreement is the "Pilot Agreement". In addition there are retirement plans and other agreements such as the "System Board of Adjustment Agreement" required by the Railway Labor Act. 45 U.S. Code §184.

Among other types of planes, Western operates DC-10 aircraft. The DC-10 aircraft is the only wide body aircraft operated by Western. FAA regulations require that DC-10's be manned by a flight deck crew of three pilots, one of whom must be qualified to perform FAA prescribed flight engineer functions. Western's Second Officers perform these functions and hence are required to hold an FAA flight

engineer's certificate as well as a pilot's license.

The Second Officer does not directly manipulate the flight controls. However, he is responsible for the supervision and operation of a variety of systems necessary to the safe operation of the aircraft. He also has important duties during emergencies. (A-38). The FAA prescribed responsibilities of the three pilots are specific but overlap considerably, particularly during emergencies when safety is placed at its greatest risk.

2. The FAA Age 60 Rule.

Since 1960 an FAA regulation has prohibited commercial airline pilots from serving in that capacity past their 60th birthdays. 14 C.F.R. §121.383(c) ("the Age 60 Rule"). This regulation has been premised upon extensive FAA medical studies which conclude that beyond age 60 the rate of physical and mental disablement increases markedly and cannot be reliably predicted or managed by individualized testing. These medical conclusions have been repeatedly challenged and sustained by the Courts. See *Keating v. Federal Aviation Administration*, 610 F.2d 611 (9th Cir., 1979) and cases cited therein.

The mandatory application of the Age 60 Rule does not extend to pilots performing solely flight engineer functions. However, because of the close relationship between the duties of a pilot and a flight engineer, the same unpredictable and individually unmanageable age-related disablements which *require* the retirement of a pilot also create a potential safety hazard if they occur in a flight engineer. Consequently Western, as a matter of voluntary business judgment, imposes an age 60 limitation upon flight engineers.

3. Impact of 1978 ADEA Amendments.

Prior to April 6, 1978, the right of an airline to impose an age 60 restriction on flight engineers rested primarily upon the age 60 retirement plans which had grown up in

the industry around the Age 60 Rule, and which legitimized age 60 retirement pursuant to ADEA §4(f)(2). See *United Airlines, Inc. v. McMann*, 434 U.S. 192 (1977); *Aldendifer v. Continental Air Lines, Inc.*, 650 F.2d 171 (9th Cir., 1981).

One consequence of 18 years under the Age 60 Rule prior to 1978 was that collectively bargained seniority systems at Western and other airlines had matured around a pattern of job progression which did not contemplate that a highly paid Captain nearing age 60 would voluntarily want to "downbid" to the lower paid and less prestigious job of flight engineer. The failure to provide for the exercise of seniority preferences on such downbids arose not out of conscious choice but simply out of a lack of demand for such a bizarre request. However, when *McMann* was legislatively overruled on April 6, 1978 (Pub.L. 95-256; 92 Stat. 189), two hitherto unaddressed problems of ADEA interpretation were faced for the first time by the entire airline industry.

(1) What, if any, duty did airline employers and ALPA have to rescue pilots impacted by the FAA's Age 60 Rule? Was there a duty implicitly created by the ADEA to modify existing and mature seniority systems to accommodate Captains making what had formerly been the unthinkable request to downbid to flight engineer jobs at or approaching age 60? See generally *ALPA v. TWA*, 713 F.2d 940 (2nd Cir. 1983), *cert. granted sub nom. TWA v. Thurston, et al.*, No. 83-997 (February 27, 1984).

(2) If a Captain somehow secured a downbid to flight engineer, was the airline entitled to continue its existing practice of retiring flight engineers at age 60 pursuant to the BFOQ provisions of ADEA §4(f)(1)?

4. Pilot Demands Prior to Suit.

In late 1977, 59-year-old Captains Criswell and Starley submitted downbids for posted Second Officer vacancies. Western rejected the bids on the grounds that they were not

authorized by the collectively-bargained Pilot Agreement which Western interpreted, in practical effect, as giving seniority preference for these vacancies to younger pilots having less senior "seniority numbers". Both pilots grieved the denials, claiming that Western had misinterpreted the seniority system in the Pilot Agreement. The grievances were heard by the Western Air Lines Pilots System Board of Adjustment as required by the Railway Labor Act, 46 U.S.C. §184. After an evidentiary hearing, at which Criswell and Starley were represented by their present counsel, the System Board sustained Western's interpretation of the seniority system and denied both grievances (A-84-94). Neither Criswell nor Starley sought the judicial review of the System Board proceedings that the Railway Labor Act itself provides. 45 U.S.C. §§153 First (q) and (r).

Also in late 1977, Captains Criswell and Starley and 59-year-old career DC-10 Second Officer Ron advised Western that they wished to work as Second Officers after reaching age 60 (June/July 1978). In February 1978 all three pilots were informed by Western that they would be retired at age 60 in accordance with the pilot retirement plan.[1]

Two months later (April 6, 1978) the ADEA was amended, in part to legislatively overrule *McMann*, *supra*.

5. Proceedings Below — *Criswell*.

On June 6, 1978 Criswell, Starley and Ron sued for themselves alone claiming that their pending mandatory retirements at age 60 would violate ADEA §4(a), 29 U.S.C. §623(a). ALPA was not sued or otherwise joined in the action. All three plaintiffs sought preliminary injunctions.

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[1]The terms of Western's pilot retirement plan and its uniform retirement practices requiring all flight deck personnel to retire at age 60 were identical to those at issue in *McMann* and *Aldendifer*, *supra*.

Ron's application was granted and in compliance with the decree his employment as a Second Officer was continued past his 60th birthday. The applications of Criswell and Starley were denied, and they were retired on their 60th birthdays.

In November 1980 a jury returned verdicts for all three plaintiffs awarding substantial damages. In May 1981 the trial judge issued findings and conclusions in the form of a memorandum opinion (A-31) and a final judgment and permanent injunctions were filed (A-54-59). In addition to requiring Western to award Criswell and Starley DC-10 Second Officer positions and not involuntarily to retire any plaintiff before his 70th birthday, the judgment decreed classwide relief (A-57-58) enjoining Western from:

a. Refusing or failing to permit flight deck crewmembers to work or continue to work as Second Officers after age 60 for any reason based on age;

b. Refusing or failing to consider or act favorably upon downbids by Captains or First Officers for Second Officer positions for any reason based on age;

c. Continuing to enforce its policy of requiring all flight deck personnel, including Second Officers, to retire at age 60;

d. Any further violation of ADEA §4(a).

Injunctive relief applicable to pilots other than the three named plaintiffs was stayed by the District Court pending appeal.

Western appealed to the Ninth Circuit Court of Appeals and the judgment was affirmed (A-1).

6. Proceedings Below — *Stone*.

The *Stone* action was filed on October 26, 1981, five months after the *Criswell* judgment. It is a sequel to and was assigned to the same district judge as *Criswell*, claiming

similar relief on behalf of eight DC-10 Captains, one career DC-10 Second Officer (Albert White), and, unlike *Criswell*, is a class action for pilots similarly situated. Three (3) retired DC-10 Captains have recently "opted-in," in addition to the nine original plaintiffs.

Western's response paralleled that in *Criswell* with the significant addition of joining ALPA as a third-party defendant.

All plaintiffs sought a preliminary injunction. In December 1981 the district judge issued a memorandum decision and order (A-95), giving collateral estoppel effect to *Criswell* to reinstate Second Officer White but denying the application for reinstatement of the other plaintiffs.

Western appealed those portions of the interlocutory order reinstating Albert White under principles of collateral estoppel while simultaneously refusing to clear the collective bargaining impasse with ALPA which was blocking the expanded medical testing that purportedly justified overruling the BFOQ in *Criswell* (A-52-53). The Ninth Circuit affirmed the district court (A-28-29).

While this interlocutory appeal was pending, the district court revised a part of its order by ruling that Western's seniority system did not give bidding preference to younger pilots vis-a-vis Captains who had been retired pursuant to the Age 60 Rule. *Stone v. Western Air Lines, Inc.*, 544 F.Supp. 33 (C.D. Cal. 1982) (A-101)[2]. That interpretation was contrary to a longstanding practice by both Western and ALPA under the seniority system. Thereafter, the Ninth Circuit interpreted the *Criswell* record to find a similar re-

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[2]This particular *Stone* ruling was relied upon by the Second Circuit in *ALPA v. TWA*, 713 F.2d 940, 952, 953, *cert. granted sub nom., TWA v. Thurston*, No. 83-997 (February 27, 1984). See argument pp. 10, *et seq. infra*.

construction of the collectively bargained seniority system by the jury (A-8 at Fn.).

Recently, the district court again modified its interlocutory ruling to reinstate the *Stone* Captains (A-112). Final trial in *Stone* will probably remain deferred until this *Criswell* appeal has been resolved.

REASONS FOR GRANTING THE WRIT.

I.

THIS CASE INVOLVES A QUESTION RECENTLY RECOGNIZED BY THIS COURT AS BEING IMPORTANT TO THE ADMINISTRATION OF THE SENIORITY SYSTEM EXEMPTION FROM THE ADEA CONCERNING WHETHER A COURT OR JURY MAY SUBVERT THE EXEMPTION BY GIVING A COLLECTIVELY BARGAINED SENIORITY SYSTEM AN INTERPRETATION CONTRARY TO THAT GIVEN IT BY THE RAILWAY LABOR ACT.

In *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982), this Court stated:

> "Seniority provisions are of 'overriding importance' in collective bargaining, . . . and they 'are universally included in these contracts.' . . . The collective-bargaining process 'lies at the core of our national labor policy . . . .' . . . Congress was well aware in 1964 that the overall purpose of Title VII, to eliminate discrimination in employment, inevitably would, on occasion, conflict with the policy favoring minimal supervision by courts and other governmental agencies over the substantive terms of collective-bargaining agreements . . . Section 703(h) [of Title VIII] represents the balance Congress struck between the two policies, and it is not this Court's function to upset that balance." 456 U.S. at 76-77 (citations and footnote omitted).

We assume that this Court would find that Congress struck a like balance with respect to the seniority system exemption provided by Section 4(f)(2) of the ADEA, 29 U.S.C. §623(f)(2).

That balance is directly before this Court in *ALPA v. TWA*, 713 F.2d 940, 951-956 (2d Cir 1983), *cert. granted sub nom. TWA v. Thurston*, No. 83-997 (February 27, 1984). Issue 3 in that appeal examines whether the Second Circuit

properly overruled an ADEA §4(f)(2) defense because the collectively bargained seniority system failed to avoid a discriminatory impact upon Captains whose jobs were lawfully abolished at age 60. In *Criswell*, the Ninth Circuit similarly, but in even more explicit derogation of the Railway Labor Act, emasculated ADEA §4(f)(2) by treating the trial record as if the jury had rewritten Western's collectively bargained seniority system.

Western contended below that the seniority system exemption provided by Section 4(f)(2) of the ADEA immunized the operation of any system which was free of "discriminatory purpose", that the pilots seniority system at Western was free of any such purpose and that it operated to deny the downbids requested by Captains Criswell and Starley.[3] Western relied upon this Court's precedents interpreting the seniority system exemption provided by Section 703(h) of Title VII from the 1977 trilogy[4] through the decisions in *American Tobacco, supra*, 456 U.S. 63, and *Pullman-Standard v. Swint*, 456 U.S. 273 (1982). Western pointed out that there was no suggestion, let alone proof, that its pilots seniority system was "purposefully discriminatory." *American Tobacco*, 456 U.S. at 70. Indeed, Captains Criswell and Starley freely admitted, ". . . Western's seniority system is not being challenged. Plaintiffs relied on Western's seniority system" to bid down to top second officer positions, to the detriment of the job rights of less senior second officers. Plaintiffs-Appellees' Brief to the

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[3]Western also argued that Captain Criswell and Starley had no claim because the ADEA does not require Western to provide other employment for 60-year-old pilots governed by the FAA's Age 60 Rule and that the claimed discriminatory consequences arose from operation of the FAA's Rule, not the seniority system.

[4]*Teamsters v. United States*, 431 U.S. 324 (1977); *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

Ninth Circuit, p. 30.[5] Lastly, to demonstrate that the downbids submitted by Captains Criswell and Starley were not permitted under the terms of the seniority system, Western relied upon the system board of adjustment's decision so holding. (See A-84.)

The court of appeals sidestepped the seniority system exemption issue by ruling that the weight due the system board of adjustment's determination is governed by *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981), and that it was sufficient under those cases that "the district court allowed into evidence the board's determination and instructed the jury that it was a 'reasonable factor other than age.' " (A-7-8.) "Our ruling on this issue makes it unnecessary to reach Western's argument dealing with the bona fide seniority system exemption provided by 29 U.S.C. §623(f)(2). The question of the meaning of the collective bargaining agreement's provisions with regard to what forms of downbidding were permitted was in effect submitted to the jury." (A-8, n. 3.)

The reliance below on *Gardner-Denver* and *Barrentine* is misplaced. Neither involved (as here) a statutory exemption or exception depending upon the terms of a collective bargaining agreement or the observance thereof. Indeed, in *Barrentine*, this Court signaled that had the plaintiff's claim depended upon application of one of the exceptions of the Fair Labor Standards Act referring to collective bargaining agreements, the situation would be different. In such a case,

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[5]*Compare Sledge v. J.P. Stevens & Co., Inc.*, 585 F.2d 625, 636 (4th Cir., 1978), *cert. denied*, 440 U.S. 981 (1979): "Because the plaintiffs here concede that they do not challenge the bona fides of Stevens' seniority system, the conclusion that the departmental seniority system violated Title VII must be reversed."

this Court said, "we assume without deciding that a court should defer to a prior arbitral decision construing the relevant provisions of the collective-bargaining agreement." 450 U.S. at 742, n. 19. In those circumstances, a court would not have discretion as to the weight to be accorded an arbitral decision, but would be bound by the decision. *Cf. W.R. Grace and Co. v. Local Union 759*, ... U.S. ...., 103 S.Ct. 2177, 2182-2183 (1983).

The basis for deference is, if anything, stronger here because the arbitral decision was that of an airline system board of adjustment the establishment of which was mandated by the Railway Labor Act and which has exclusive jurisdiction to resolve disputes concerning the interpretation of collective bargaining agreements reached pursuant to the processes prescribed in that Act. 45 U.S.C. §184; *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711 (1945); *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320 (1972). As stated by this Court in *Andrews*:

> "[T]he compulsory character of the administrative remedy provided by the Railway Labor Act for disputes such as that between petitioner and respondents stems not from any contractual undertaking between the parties but from the Act itself . . . ." 406 U.S. at 323.

Moreover, there is no tension between the ADEA and the duties of the system board under the RLA. Whether the subject downbidding was permitted under the pilots seniority system is an issue wholly independent of any question of discrimination. As the court of appeals recognized:

> "In the instant case, the System Board concerned itself solely with the law of the shop and the intent of the parties; ADEA rights did not enter into its consideration at all." (A-7.)

Western observed the terms of the bona fide pilots seniority system in denying the downbids submitted by Captains

Criswell and Starley. Section 4(f)(2) of the ADEA immunized the operation of the system.

The decision below should be vacated and the case remanded for consideration of the seniority system exemption issue.

II.

THE DECISION BELOW IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS RESPECTING THE NATURE OF THE EVIDENTIARY BURDEN PLACED UPON AN EMPLOYER IN A SUIT BROUGHT UNDER THE ADEA WHERE THE CLAIM IS THAT THE JOB ACTION WAS BASED ON REASONABLE FACTORS OTHER THAN AGE.

The district court instructed the jury that Western had the burden of proving "by a preponderance of the evidence" that its refusal to allow Captains Criswell and Starley to downbid to the position of second officer was motivated by "reasonable factors other than age". The court of appeals upheld the instruction, stating:

> "The 'reasonable factors' defense appears alongside the BFOQ exception in the ADEA, 29 U.S.C. §623(f), and is an affirmative defense for which the employer bears the burden of proof." (A-16.)
>
> "We recognize that the Fifth Circuit's decision in *Marshall v. Westinghouse Elec. Corp.*, 576 F.2d 588 (5th Cir. 1978), is not in accordance with our analysis here. In the context of a disparate treatment claim, that court treated the reasonable factors other than age defense as an analog to the legitimate, non-discriminatory reason rebuttal developed in *McDonnell Douglas*. Since we do not believe that a statutory exception may be properly analogized to the second stage of the case-in-chief under a disparate treatment theory, we decline to follow the Fifth Circuit's reasoning." (A-17.)

A similarly phrased "reasonable factors" burden of proof instruction was given in *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1008 (1st Cir., 1979). The First Circuit held that by itself "the district court's misstatement of the burden of proof was a serious enough error to require a new trial . . ." (*id.*, at 1012) and that the mere fact that Congress chose to include in the ADEA a provision having "no parallel in Title VII . . . that older persons may be treated differently for reasons other than age . . . does not repudiate the *McDonnell Douglas* approach." (*Id.*, at 1015-1016.) This Court has cited *Loeb* as a decision which is in harmony with "our precedents". *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252, n. 4 (1981). Also see, *e.g.*, *Smith v. University of North Carolina*, 632 F.2d 316, 332-333 (4th Cir., 1980).

The error in the court of appeals' decision is fundamental. The burden is improperly placed upon the employer to prove that age was *not* a determining factor, when it is the employee's burden at all times to prove that age *was* a determining factor. *Burdine, supra*, 450 U.S. at 253; *Loeb, supra*, 600 F.2d at 1011; *Douglas v. Anderson*, 656 F.2d 528, 531 (9th Cir., 1981). The BFOQ defense, on the other hand, is never reached if age was not a determining factor.[6]

The wrong legal standard was applied. The issue is of importance generally in the administration of the ADEA and its provision that an employer lawfully may take job actions with respect to older employees where the differentiation is

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[6]The error stultifies the court of appeals' findings elsewhere that the erroneous "pretext" instruction was harmless. On that subject, the court reasoned that the "legitimate nondiscriminatory reason asserted by Western" was that the downbids were not permitted under the Pilot Agreement and that "[o]nly if the jury found that the reason Western offered was pretextual would it have reached the affirmative defense of 'reasonable factors other than age.' " (A-21-22.)

based on reasonable factors other than age.

The decision below should be vacated and the case remanded for application of the correct standard.

III.

A CONFLICT EXISTS AMONG THE CIRCUITS AS TO THE STANDARDS WHICH SHOULD BE APPLIED BY A TRIAL COURT OR JURY IN OVERRULING A DISCRIMINATORY JOB RESTRICTION IMPOSED TO PRESERVE PUBLIC SAFETY.

ADEA §623(f)(1) provides:

> "It shall not be unlawful for an employer . . . to take any action otherwise prohibited by this section where age is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of the particular business . . ."[7]

In selecting its flight officers, Western has a duty, recognized by the Federal Aviation Act, to seek "the highest possible degree of safety in the public interest" 49 U.S.C. §1421(b); *World Airways v. Internat. Broth. Etc.*, 578 F.2d 800, 803 (9th Cir., 1978). One mandatory regulation defining that duty requires the retirement of all pilots at age 60. 14 C.F.R. §121.383(c). That rule is premised in part upon medical studies of the Federal Aviation Administration concluding that it is impractical to deal on an individual basis with the physical and mental disablements accompanying age beyond age 60. 24 Fed. Reg. 9776-9778 (1959).[8]

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[7]A similar BFOQ provision appears in Title VII of the Civil Rights Act of 1964 with respect to sex discrimination in employment. 42 U.S.C. §2000e-2(e). See generally *Dothard v. Rawlinson*, 433 U.S. 321, 332-338 (1977).

[8]These conclusions were recently reaffirmed by a congressionally mandated study of experts. Pub.L. 96-171, December 29, 1979, 93 Stat. 1285. The Panel's Study was submitted in August 1981 (after trial herein) and is entitled "The Report of the National Institute of Aging Panel on the Experienced Pilots Study".

The medical conclusions underlying the Age 60 Rule have been repeatedly sustained by the courts. See *Keating v. Federal Aviation Administration*, 610 F.2d 611 (9th Cir., 1979) and cases cited therein. The Department of Labor issued a regulation *under the ADEA* approving the Age 60 Rule (and implicitly the medical conclusions which support it) as a BFOQ. 44 Fed. Reg. 37974. 29 C.F.R. §860.102. That BFOQ has been recognized as authoritative by the Courts. *Usery v. Tamiami Trail Tours*, 531 F.2d 224, 230 (5th Cir., 1976); *Starr v. Federal Aviation Administration*, 589 F.2d 307, 313 (7th Cir., 1978).

The job of flight engineer (Second Officer) is closely akin to that of a pilot, and carries significant safety responsibilities, including ". . . to monitor and adjust a number of systems which are *necessary* to the operation of the aircraft . . . [including] important contingency duties in emergency situations." *Criswell v. Western Air Lines, Inc.*, 514 F.Supp. 384, 390 (C.D. Cal. 1981) (A-38). A pilot must leave his seat and assigned responsibilities to perform those required of a disabled flight engineer. An FAA regulation prohibits Western from employing a crew redundancy practice which requires "the performance of multiple functions at the same time by one airman." 14 C.F.R. §121.385(b).

Western concluded as a matter of corporate policy that the age disablements which mandate retirement of pilots at age 60 also create a material safety hazard in flight engineers. Therefore, it required its flight engineers also to retire at age 60. Fifty percent (50%) of the airline industry shared Western's business judgment. (See A-14, 39.)[9]

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[9]Prior to the 1978 amendments to the ADEA this 50% figure was even higher and would have included TWA. See *Air Line Pilots Ass'n v. Trans World Airlines, Inc.*, 713 F.2d 940, 945-946 (2nd Cir., 1983), *pet. for cert. pending*.

As noted by the court of appeals, Western's business judgment in imposing an age 60 BFOQ for flight engineers addressed a ". . . tension between the obligations of a public carrier to operate safely and the requirement of the ADEA that an employer establish a BFOQ defense as 'reasonably necessary' ". (See A-12.) However, the standards adopted by the various circuits for resolving such tensions are not coherent, and involve materially conflicting guidelines.[10]

At one extreme are circuit decisions which explicitly favor safety by recognizing that where by a law (*e.g.*, the Federal Aviation Act) an employer is entrusted with public safety responsibilities, the trial court should sustain a BFOQ imposed by the employer within that sphere of responsibility if it is supported by a substantial factual basis. At the other extreme are circuit decisions (such as *Criswell*) which by necessary implication favor danger, and mandate rejection of the BFOQ unless the employer overcomes the burden of persuading the trial judge or jury that its BFOQ is "reasonably necessary" in the sense of being the "right" policy. The trial court (or jury) is thus required to supplant the employer's discretionary policy with its own.[11]

More particularly, in the Fifth and D.C. Circuits the trial court is expressly encouraged to accord deference to the business judgment of an employer having a public safety responsibility.

> "We believe that courts [and juries] must afford employers substantial — though not absolute — discretion in selecting specific safety standards and in judging their reasonableness. * * * We emphasize safety in busing . . . is of such humane importance that the employer must be afforded substantial discretion in selecting specific standards which, if they err at all, should err on the side of preservation of life and limb." *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 n. 30, 238 (5th Cir., 1976).
>
> ". . . in our judgment the airline industry must be accorded great leeway and discretion in determining the manner in which it may be operated *most* safely [citing *Tamiami*] . . . *'safe' is not sufficient. Rather the 'safest' possible air transportation is the ultimate goal.*[12] Courts [and juries], in our view, do not possess the expertise with which, in a cause presenting safety as the critical element, to supplant their judgments for those of the employer." *Murnane v. American Airlines, Inc.*, 667 F.2d 98, 101 (D.C. Cir., 1981), *cert. den.* 456 U.S. 915 (1982).

The Seventh Circuit, in claimed consistency with *Tamiami*, has recently stated the appropriate standards for determining "reasonable necessity" to be as follows:

> ". . . in order to prevail on a BFOQ defense, an employer must show [1] that the challenged age qualification is *reasonably related to* the essential operation of its business, *and* [2] must demonstrate . . . that *there is a factual basis for believing*[13] . . . that it is impossible or impracticable to determine job fitness on indivi-

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[10]"Although superficially, this section [ADEA §623(f)(1)] appears to offer . . . a means for lessening the administrative burden of retiring unfit employees on a case by case basis, the [statutory] exception does not work in practice" *E.E.O.C. v. Wyoming*, 103 S.Ct. 1054, 1071 (1983) (Justices Burger, Powell, Rehnquist, and O'Connor, dissenting).

[11]See *e.g.*, *Tuohy v. Ford Motor Co.*, 490 F.Supp. 258, 260-264 and n. 3 (E.D. Mich. 1980), rev'd 675 F.2d 842 (6th Cir., 1982).

[12]Emphasis in quotations is added except where otherwise indicated.

[13]The earlier enunciation of this standard, relied upon by Western at trial (See A-9, 11), required the employer to "demonstrate that it has *a rational basis in fact to believe* that elimination of its [BFOQ] will increase the likelihood of risk of harm to its passengers. [The employer] need only demonstrate however a *minimal* risk of harm to its passengers." *Hodgson v. Greyhound Lines*, 499 F.2d 859, 863 (7th Cir., 1974), *cert. den.* 419 U.S. 1122 (1974).

dualized basis." *Orzel v. City Wauwatosa Fire Dep't.*, 697 F.2d 743, 753 (7th Cir., 1983), *cert. den.*, ... U.S. .... (1983).

Other similar restatements of the *Tamiami* rule require the employer to prove only that it had "reasonable cause, that is, a factual basis for believing" the truth of the requisite BFOQ elements. *E.E.O.C. v. U. of Texas Health Science Center*, 710 F.2d 1091, 1093 (5th Cir., 1983); *Arritt v. Grisell*, 567 F.2d 1267, 1271 (4th Cir., 1977); Accord: *Wright v. Olin Corp.*, 697 F.2d 1172, 1191 (4th Cir., 1982).

In contrast to the foregoing, the most recent decisions[14] of the Ninth Circuit require the employer to prove the truth of the BFOQ elements, not merely that it had "reasonable cause, *i.e.*, a factual basis for believing" the truth of these elements. *E.E.O.C. v. County of Los Angeles*, 706 F.2d 1039, 1042-1043 (9th Cir., 1983), *cert. den.*, ... U.S. .... (1984).[15] Similarly in *Criswell* the BFOQ instruction to the jury held proper by the Ninth Circuit (A-8-9, 37) did not permit the jury to sustain the BFOQ if Western had merely "a rational basis in fact for believing" the BFOQ elements (A-10-11).[16] This instruction not merely required Western to demonstrate that disabled flight engineers create safety hazards comparable to pilots; additionally, in practical effect, it directed the jury to reject the FAA medical rationale unless Western sustained the burden of persuasion in re-

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[14]*Cf. E.E.O.C. v. County of Santa Barbara*, 666 F.2d 373, 376-377 and n. 9 (9th Cir., 1980).

[15]The petition for certiorari presented materially different issues from *Criswell*. After a *non-jury* trial, an *age 35* maximum hiring BFOQ for police and fire department helicopter pilots was invalidated. The employer was *not* entrusted with a "highest possible safety" duty, nor did the petition address an employer's right to rely upon FAA medical conclusions pertaining to age 60 "pilots".

[16]The trial judge agreed that under a "rational basis in fact" test Western would have been entitled to a directed verdict and judgment n.o.v. R.T. 1235-1236.

constructing to the jury's satisfaction this longstanding, albeit technologically complex and controversial, federal policy (A-10, 12-14).

Moreover, in requiring the jury in effect to legislate a resolution of the tension between Western's statutory duties, the Ninth Circuit considered it appropriate for the jury instructions to omit definition of one horn of that tension, *i.e.*, the Federal Aviation Act's "highest possible degree of safety" standard (A-11-12). This ruling is in direct conflict with the D.C. Circuit. See *Murnane* quotation *supra*, p. 19.

Paralleling the inconsistency in BFOQ standards is a bewildering inconsistency of rulings on substantially identical BFOQs. Thus the Eighth Circuit accepts while the Sixth Circuit rejects trial court rulings sustaining age 60 retirement BFOQs for private corporate pilots.[17] *Hoefelman v. Conservation Commission of Missouri*, 718 F.2d 281 (8th Cir., 1983); *Tuohy v. Ford Motor Co.*, 675 F.2d 842 (6th Cir., 1982). The D.C. Circuit sustained a trial court acceptance of an age 40 hiring BFOQ for pilots while the Fourth Circuit sustained a trial court rejection of an age 35 hiring BFOQ for pilots. *Murnane v. American Airlines, Inc.*, 667 F.2d 98 (D.C. Cir., 1981), *cert. den.* 456 U.S. 915 (1982); *Smallwood v. United Air Lines*, 661 F.2d 303 (4th Cir., 1981), *cert. den.* 456 U.S. 1007 (1982). Such a pattern of rulings gives a conscientious employer no reliable guide for

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[17]A Texas jury sustained American Airlines' age 60 BFOQ for flight engineers *Johnson v. American Airlines, Inc.*, 18 Av. Cas. 17,177 (N.D. Tex. 1983) *appeal pending* (5th Cir.). A Chicago jury rejected United Air Lines' age 60 BFOQ for flight engineers. 31 EPD ¶s 33,329-33,331, *appeal pending* (7th Cir.).

shaping its own policies.[18]

Airlines and other safety intensive employers cannot be expected aggressively to pursue their public safety responsibilities of eliminating unsafe older employees by policies that risk such unpredictable and ruinous ex post facto evaluation by juries.[19] *Criswell* sends a clear message that employment policies for older employees must be measured by the *least* safe policy tolerated by a substantial segment of the industry (A-14, 39). We do not believe that the ADEA was enacted either thus to compromise an airline's public safety responsibilities under the Federal Aviation Act, or to place in the hands of a trial jury the task of resolving the tension between those two statutes.

The *Tamiami/Orzel* rule (quoted, *supra*, pp. 19-20) for a safety BFOQ can be rendered workable if the Supreme Court makes clear (1) that the trier of fact is *not* directly concerned with the absolute truth of the BFOQ elements; (2) rather, the trier of fact *must* sustain the BFOQ if it "finds" that *the employer* had "*reasonable* cause, *i.e.*, a

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[18]Litigation regarding safety groundings of pregnant flight attendants, although sustaining such restrictions, exhibits dissents and multiple concurring opinions that further evidence appellate uncertainty in this area. See *Burwell v. Eastern Air Lines, Inc.*, 633 F.2d 361 (4th Cir., en banc, 1980), *cert. den.* 450 U.S. 965, *Harriss v. Pan American World Airlines*, 649 F.2d 670 (9th Cir., 1980). Unlike the flight engineer who works continuously with the other pilots in the cockpit, the ordinary duties of a flight attendant do not involve safety. (See *Harriss*, 649 F.2d at 679-680). Consequently, it is additional evidence of appellate inconsistency in the safety BFOQ area that appellate courts have sustained employment restrictions for flight attendants while denying employment restrictions for older flight engineers having equivalent disablement risks which are addressed to a potentially more critical safety hazard.

[19]The *Criswell* judgment, including the award of attorneys' fees, amounted to more than $200,000.00 per plaintiff. In the sequel *Stone* lawsuit (A 4-5), the plaintiff class now includes 12 pilots. A similar lawsuit recently resulted in an $18,092,657.02 judgment. *Monroe v. United Air Lines, Inc.*, 31 EPD ¶33,329 (1982).

factual basis, for believing" the truth of the specific *Tamiami/Orzel* BFOQ elements.

Moreover, within the *Tamiami/Orzel* framework, the "essential operation" of an airline should be "the highest possible degree of safety"; "safe" is not enough.

IV.

THIS DECISION CREATES A CONFLICT WITH OTHER CIRCUITS REGARDING THE SIGNIFICANCE OF PRETEXT IN NULLIFYING AN EMPLOYMENT RESTRICTION OTHERWISE JUSTIFIED BY PUBLIC SAFETY CONSIDERATIONS.

The district court's charge to the jury included the "pretext instruction" set out in the decision below. (See A-18.) The jury was told that even if it found for Western with respect to one or more of Western's defenses (one of which was that an age less than 60 for its second officers is a BFOQ), plaintiffs were still entitled to prevail if they proved that the "reasons stated in [Western's] case are merely pretexts for age discrimination."

The court of appeals agreed that error was committed in the instruction. (A-19.) Insofar as the BFOQ defense is concerned, the court reasoned, however, that before the jury would have reached that defense it would have had to reject as pretextual the "legitimate, nondiscriminatory" safety reason asserted by Western for retiring second officers at age 60[20] and that when the jury turned to the BFOQ defense, it could not find for Western on that defense without ac-

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[20]Western's "pilot organism" argument dealt with the functions performed in emergencies and critical phases of flight by the second officer as an integral part of the flight deck crew (See A-13), *not* with the potential of sudden incapacitation at age 60 and above under the "second" prong of the BFOQ defense.

The "evidence of pretext" [allowing a 56-year-old captain who could pass the flight engineer but not the pilot physical exam to downbid to second officer] pertains to neither prong.

cepting "the same argument which it had just rejected as pretextual in order to reach the defense at all." Hence, the error was deemed harmless. (A-23.)

The holding misconceives the essence of a BFOQ, which is to justify action which otherwise would be prohibited. Western's policy of requiring second officers to retire at age 60 is an express, age-based rule. The burden was on Western to prove it was a BFOQ by objective evidence. Western's subjective intent has no bearing either to prove or disprove the BFOQ. See, *e.g., Orzel v. City of Wauwatosa Fire Dept.*, 697 F.2d 743, 750 (7th Cir., 1983); *E.E.O.C. v. University of Texas Health Science Center*, 710 F.2d 1091, 1096 (5th Cir. 1983); Accord *Burwell v. Eastern Air Lines, Inc.*, 633 F.2d 361, 372-373 (4th Cir. en banc, 1980), *cert. den.* 450 U.S. 965 (1981) In the *University of Texas* case, the Fifth Circuit stated:

> "[W]e are extremely indisposed to read an intent requirement into the *Tamiami* test . . . we think it wiser to interpret the test as requiring the defendant to demonstrate *at trial*, with *objective* evidence, that the age qualification is justified, rather than looking to the subjective motivation originally behind the qualification." 710 F.2d at 1096.

Once a BFOQ is proved, no room is left for showing pretext or cover-up for the discrimination which the qualification justifies. The instruction in practical effect told the jury that there is no public safety interest, however objectively valid, which justifies age discrimination.

One glaring irony caused by the pretext instruction, which would be amusing were the potential consequences not so tragic, is that the jury may actually have found in favor of Western on the BFOQ. See discussion by district court. A-44-45; *cf.* A-36-37; *Cf. DeSollar v. Hanscomb*, 158 U.S. 216, 221-222 (1895). Thus, the sweeping systemwide in-

junction requiring Western to use 60 to 70-year-old flight engineers (A-50-51) may in fact be inconsistent with an actual jury finding *that the practice is unsafe*.

CONCLUSION.

For those reasons a writ of certiorari should be issued to review the opinion and judgment of the Ninth Circuit.

Respectfully submitted,

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APPENDIX

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(2)

No. 83-1545

IN THE

Supreme Court of the United States

October Term, 1983

WESTERN AIR LINES, INC.,

Petitioner,

vs.

CHARLES G. CRISWELL, ALBERT RON and RULON H. STARLEY,

Respondents.

WESTERN AIR LINES, INC.,

Petitioner,

vs.

WESTCOT B. STONE, III, *et al.*,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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INDEX TO APPENDICES

Opinion of the Ninth Circuit; Filed 6/28/83 ..... App. p. A1

Memorandum Opinion of District Court; Filed 5/12/81 ..... A31

Final Judgment and Permanent Injunction; Filed 5/12/81 ..... A54

Correction of Final Judgment and of Memorandum Opinion; Filed 5/13/81 ..... A59

Memorandum Decision and Order Re Attorneys Fees; Filed 11/3/81 ..... A60

Findings of Fact and Conclusions of Law, Filed April 25, 1979 ..... A67

Amended Findings of Fact and Conclusions of Law, Filed September 11, 1979 ..... A74

Order, Filed September 11, 1979 ..... A82

Order of the Ninth Circuit; Filed 12/20/83 ..... A83

System Board Decision; Dated November 1978 ..... A84

Dissenting Opinion, Re: ALPHA Case No. WAL-5-78 ..... A92

APPENDIX.

Opinion of the Ninth Circuit; Filed 6/28/83.

United States Court of Appeals for the Ninth Circuit.

Charles G. Criswell, Albert Ron, Rulon H. Starley, Plaintiffs-Appellees/Cross-Appellants, v. Western Air Lines, Inc., Defendant-Appellant/Cross-Appellee, Joan Celia Lavine, Non-Party Appellant. Nos. 81-5536, 81-5619, 81-6013, 81-6023. DC No. 78-2184.

Westcot B. Stone III, Bill H. Pelton, Jack R. Dean, Norval P. Cavett, Alan L. McLaren, Brentnall J. Higgs, Henry J. Wiegand, Albert J. White, and Robert L. Butler, Plaintiffs-Appellees, v. Western Airlines, Inc., Defendant-Appellant. No. 82-5082. DC No. 81-5521.

Western Air Lines, Inc., Third-Party Complainant/Appellant, Air Line Pilots Association International, etc., et al., Third-Party Defendants/Appellees.

Filed: June 28, 1983.

Appeal from the United States District Court for the Central District of California.

A. Wallace Tashima, District Judge, Presiding.

Argued and Submitted October 8, 1982.

Before: KENNEDY, TANG and FERGUSON, Circuit Judges FERGUSON, Circuit Judge:

Western Air Lines, Inc. appeals two adverse decisions in which the district court found that it had violated the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34. The trial court determined that Western violated the ADEA when it (1) refused to allow DC-10 captains nearing the age of sixty to downbid to the position of flight engineer and (2) imposed a mandatory retirement age of sixty on flight engineers as a matter of company policy. The plaintiff airline pilots alleged both discriminatory treatment and disparate

impact. Western raised four defenses: first, that denial of the downbids could not give rise to an ADEA claim as a matter of law; second, that the age sixty requirement was a bona fide occupational qualificatin and, third, was justified by reasonable factors other than age, 29 U.S.C. § 623(f)(1); and, finally, that its policies were prompted by business necessity. In the first case here before us, *Criswell v. Western Airlines, Inc.*, 514 F. Supp. 384 (C.D. Cal. 1981), a jury returned substantial damage awards for all three plaintiffs, and the court granted individual and systemwide injunctive relief. In a subsequent case, *Stone v. Western Airlines, Inc.*, No. 81-5521, the district court gave collateral estoppel effect to the *Criswell* judgment in granting a preliminary injunction which is also before us on this appeal. We affirm the district court in both cases.

FACTS

In 1977 when this case began, Western Air Lines required that all three members of a DC-10 flight deck crew retire at age sixty. The captain and the co-pilot (also known as the first officer) were required to do so under Federal Aviation Administration regulations. *Aldendifer v. Continental Air Lines*, 650 F.2d 171 (9th Cir. 1981); *Keating v. Federal Aviation Administration*, 610 F.2d 611 (9th Cir. 1979); 14 C.F.R. § 121.383(c). The third crew member, known as the flight engineer or second officer, was required to retire by Western's policies. This retirement was not mandated by the FAA.

In September 1977, plaintiff Starley was fifty-nine years old and a DC-10 captain who had thirty-two years of seniority as a pilot with Western. He entered a downbid for a position as second officer (flight engineer). Starley's seniority placed him near the head of the pilots' list.[1] The position Starley bid for was awarded on the basis of seniority under Western's collective bargaining agreement with the Air Line Pilots Association (ALPA), which represented the pilots. The bid was awarded to him immediately, but six months later Western canceled it. In November 1977, Captain Charles Criswell, who had worked for Western for forty-one years, thirty-seven of them as a pilot, submitted a downbid to move from his position as a DC-10 captain to that of DC-10 second officer, timed to take place just prior to his sixtieth birthday. This bid was denied. Plaintiff Albert Ron was a "career" second officer, having been such for twenty-three of the thirty-two years during which he had served the airline. Prior to his sixtieth birthday, he gave Western written notice of his intention to remain at work in his position beyond his sixtieth birthday.

In February 1978, Western informed all three plaintiffs that they would be required to retire at the age of sixty as established in the pilot pension plan. Claiming that the denial of downbids violated the Pilot Agreement, Criswell and Starley pursued their collectively bargained for grievance procedures. Their grievances were heard by the Western Air Lines Pilots System Board of Adjustment, which, in a decision accompanied by a vigorous dissent, denied them relief on the basis that, although the language of the agreement would have permitted their bids, such bids were never contemplated or intended by the parties. The board held that the parties had intended to permit downbidding only "in rare and carefully defined circumstances."

Before the System Board ruled, the federal court action had been filed. All plaintiffs sought preliminary injunctions.

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[1]All three positions, captain, co-pilot, and flight engineer were on one unified "pilots list" for bidding purposes under the seniority system. 514 F. Supp. at 391 & n.10.

As to plaintiff Ron, equitable relief was granted and he has remained employed as a second officer with Western throughout the litigation of this case. Criswell and Starley were retired on their sixtieth birthdays. After a fifteen-day trial, a jury returned verdicts for all three plaintiffs — for Criswell in the amount of $60,394; for Starley in the amount of $32,099; and for Ron, who had continued to work, in the amount of $5,000. The jury also found on a special interrogatory that Western's violations were "willful" with respect to each plaintiff.

Six months later, after additional hearings and briefing, the trial court filed an opinion and order which also granted the equitable relief originally sought. *Criswell v. Western Air Lines*, 514 F. Supp. at 387-97. The court ordered Western to reinstate Criswell and Starley with full seniority, to award them positions as second officers, to continue Ron in his position, and not to require their retirement prior to age seventy. The systemwide relief enjoined Western from its previous practices with regard to mandatory retirement of second officers at age sixty, age-based refusal of downbids from captains or first officers seeking second officer positions, and further violation of the ADEA.[2] The court also awarded prejudgment interest, liquidated damages, damages, costs and fees.

Six months after entry of judgment in *Criswell*, *Stone* was filed. Eight of its nine plaintiffs were DC-10 captains for Western, while the ninth, Albert White, was a second officer. They alleged that Western's refusal to continue them in employment as second officers after their sixtieth birthdays violated the ADEA and sought preliminary injunctions.

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[2]Equitable relief for all parties other than named plaintiffs in the two companion cases which make up this appeal was stayed by the district court pending the outcome of the appeal.

The court denied injunctions to the pilots but granted one to the second officer, White. In granting relief, the court gave collateral estoppel effect to the *Criswell* judgment. On appeal Western's position with regard to White is legally identical to its position with regard to plaintiff Ron in *Criswell*.

ANALYSIS

On this appeal Western argues (1) that the district court failed to accord proper deference to the System Board determination that the collective bargaining agreement did not permit the downbids attempted here, thereby depriving the airline of an absolute statutory exemption, (2) that its age sixty requirement for second officers is a bona fide occupational qualification (BFOQ), and (3) that the jury was misinstructed in a number of respects. In *Criswell*, Western also appeals the failure to join ALPA, the grant of systemwide relief, and the awards of attorneys' fees and prejudgment interest. In *Stone*, it appeals as well the grant of injunctive relief to the second officer and the denial of injunctive relief which it sought against ALPA.

I. The Deference Due the System Board

Western first contends that the bona fide seniority system set up by the collective bargaining agreement between itself and the Air Line Pilots Association will not permit downbids of the type submitted by Criswell and Starley. It insists that this matter was not open for *de novo* investigation by the district court because the System Board of Adjustment had already made that determination in 1978. The airline urges that the System Board has exclusive jurisdiction to interpret the agreement and that its decision may not be reconsidered or collaterally attacked in court. Reliance on this argument is misplaced. The right of the plaintiffs to go before the System Board is contractual, arising out of their collective

bargaining agreement. Their right to come before this court is statutory, arising out of the ADEA. As the Supreme Court has said in similar circumstances:

> The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.

Barrentine v. Arkansas-Best Freight System, 450 U.S. 728, 745-46 (1981), *quoting with approval Alexander v. Gardner-Denver*, 415 U.S. 36, 49-50 (1974).

Both *Alexander* and *Barrentine* are immediately relevant to the issue in this case. While *Alexander* dealt with Title VII, substantive rights arising under the ADEA are to be similarly construed. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755-56 (1979); *Sutton v. Atlantic Richfield Co.*, 646 F.2d 407, 411 (9th Cir. 1981). *Barrentine* extended *Alexander* into the related Fair Labor Standards Act (FLSA) context; the remedial and procedural structure of the FLSA has been incorporated into the ADEA. *Lorillard v. Pons*, 434 U.S. 575, 578 (1978).

The factors which initially prompted the Supreme Court to reject deference to arbitral decisions in these instances apply squarely to the facts of this situation. In refusing to defer, the Court first noted its special responsibilities and plenary power to enforce the statute. *Alexander*, 415 U.S. at 44-45. That same responsibility exists with regard to the ADEA. It turned next to the dangers of allowing an arbitrator to make legal and factual rulings dispositive of statutory rights when such a person, first, is often not trained as a lawyer, *id.* at 57 n.18; *Barrentine*, 450 U.S. at 743 n.21; second, is under an obligation to apply "the law of the shop rather than the law of the land"; and third, is required to

interpret the agreement in accordance with the intent of the parties rather than the intent of Congress. *Alexander*, 415 U.S. at 53, 57; *Barrentine*, 450 U.S. at 743-44. In the instant case, the System Board concerned itself solely with the law of the shop and the intent of the parties; ADEA rights did not enter into its consideration at all. Last, the Supreme Court noted the lesser powers of arbitral boards to gather reliable evidence and do thorough fact-finding and adduced those as reasons not to be bound by the factual record below when a party comes into federal court asserting a statutory right. *Alexander*, 415 U.S. at 57-58. Our case illustates the wisdom of that policy. The evidence before the System Board on the question of how and whether Western pilots practiced downbidding was miniscule when compared to that presented to the district court after the plaintiffs had exercised their federal discovery rights.

Barrentine and *Alexander* do not, however, signify the end of the long-standing policy that federal courts defer to the decisions of labor arbitrators. The Supreme Court also determined that arbitral decisions might come into evidence and be accorded such weight as the trial court deemed appropriate. It further said:

> We adopt no standards as to the weight to be accorded an arbitral decision since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective bargaining agreement that conform substantially with [the statute], the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators.

Barrentine, 450 U.S. at 743, n.22, *quoting with approval Alexander*, 415 U.S. at 60, n.21. Here the district court

allowed into evidence the board's determination that downbidding was not permitted under the collective bargaining agreement and instructed the jury that it was a "reasonable factor other than age." This conforms fully with *Alexander* and *Barrentine*. In these circumstances the decision of the board should not have been accorded greater weight.

In fact, the instruction was more favorable to Western than the evidence warranted. The plaintiffs adduced a great deal of evidence tending to show that Western did not administer its downbidding system in an age-neutral fashion, but rather that it routinely granted exceptions for younger pilots. In such a situation, the determination of the board that the downbids requested were not generally available under the agreement is merely evidence offered to rebut plaintiffs' contentions of disparate treatment of older pilots in Western's administration of the downbidding system.[3]

II. The BFOQ Defense

Western contends that the district court did not correctly understand the law of the circuit with regard to the bona fide occupational qualification defense which the defendant attempted to raise in this case. Therefore, it argues, the court misinstructed the jury and improperly denied Western's motion for judgment notwithstanding the verdict.

A. *The Jury Instruction*

The challenged instruction reads:

> If you find that plaintiffs have persuaded you by a preponderance of the evidence that their involuntary retirements were the result of policies in which age

[3]Our ruling on this issue makes it unnecessary to reach Western's argument dealing with the bona fide seniority system exemption provided by 29 U.S.C. § 623(f)(2). The question of the meaning of the collective bargaining agreement's provisions with regard to what forms of downbidding were permitted was in effect submitted to the jury.

> discrimination was a determining factor, then you must consider defendant's defense that age is a "bona fide occupational qualification" for its Second Officers (flight engineers). This defense is usually abbreviated "BFOQ". The BFOQ defense is available only if it is reasonably necessary to the normal operation-essence-of defendant's business. In this regard, I instruct you that the normal operation-essence-of Western's business is the safe transportation of air passengers.
>
> The burden of proof to show a BFOQ is on the defendant. If defendant establishes such a BFOQ by a preponderance of the evidence, then its age discrimination is lawful under the ADEA.
>
> One method by which defendant Western may establish a BFOQ in this case is to prove
>
> (1) that in 1978, when these plaintiffs were retired, it was highly impractical for Western to deal with each Second Officer over age 60 on an individualized basis to determine his particular ability to perform his job safely, and
>
> (2) that some Second Officers (flight engineers) over age 60 possess traits of physiological, psychological, or other nature which preclude safe and efficient job performance that cannot be ascertained by means other than knowing their age.
>
> In evaluating the practicability to defendant Western of dealing with Second Officers over age 60 on an individualized basis, with respect to the medical testimony you should consider the state of the medical art as it existed in July 1978.

Western objects to this instruction on five grounds. (1) It argues that the court erred in instructing that the BFOQ defense was available only if the defendant's behavior was "reasonably necessary" and contends instead that a "rational basis in fact" would have been sufficient. (2) It objects that no elucidation of the term "reasonably necessary"

was given to the jury, arguing that such is required since it is a legal term of art. (3) It objects to the description of the "normal-operation-essence" of its business as "the safe transportation of air passengers," contending that it is statutorily bound to a much higher standard of safety. (4) It objects further that the term "normal" might have been understood by the jury to encompass only routine operations rather than including periods of emergency. (5) Finally, it objects to the entire last two paragraphs, which guide the jury in how Western might establish the BFOQ defense, arguing that it should not have been required to reconstruct what it calls "the medical rationale underlying the FAA's Age 60 Rule."

In *Harriss v. Pan American World Airways, Inc.*, 649 F.2d 670, 676 (9th Cir. 1980), this circuit adopted the two-pronged test then in use in the Fourth and Fifth Circuits for establishing the BFOQ defense. First,

> ". . . the job qualifications which the employer invokes to justify his discrimination must be *reasonably necessary* to the essence of his business . . . . The greater the safety factor, measured by the likelihood of harm and the probable severity of that harm in case of an accident, the more stringent may be the job qualifications designed to insure [safety]."

Id., quoting Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 236 (5th Cir. 1976) (emphasis in original).

In formulating the "reasonably necessary" standard, *Harriss* specifically rejected a test similar to the one advanced by the defendants here. The *Harriss* trial court found that Pan American had formulated a "a *reasonable* general rule" by which it excluded all female flight attendants from working during pregnancy on the grounds of their possible disability during an inflight emergency. The Court of Appeals said:

> The flaw in the district court's standard as it applies to the BFOQ defense is that it requires only that the policy be "reasonable" in light of the safety factor rather than "reasonably necessary . . . ."
>
> Adoption of such a standard here would unnecessarily broaden the BFOQ defense which the Supreme Court characterized in *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977), as "an extremely narrow exception to the general prohibition of discrimination on the basis of sex."

Harriss, 649 F.2d at 677. Thus, it is clear that the *Criswell* jury instruction tracks both the language and the spirit of the circuit law on this matter. Western's contentions that the "rational basis in fact" standard should have been adopted are in error.[4] We also reject Western's argument that, once included in the instructions, the term "reasonably necessary" needed definition as a legal term of art. Western rests on *Harriss* as authority for that idea; however, *Harriss* stands only for the proposition that what is "reasonable" may not be "reasonably necessary." *Id.* It does not indicate that either phrase has a legal definition apart from its ordinary sense.

Western also cites *Harriss* as authority for its contention that the district court erred in describing the "normal-operation-essence" of its business as "the safe transportation" of passengers, contending instead that the language of the statute holding it to "the highest possible degree of

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[4]It is only in the *second* prong of the BFOQ defense that a standard similar to "rational basis in fact" is applied. In addition to showing that its general rule is reasonably necessary, an employer must also establish that there is a "factual basis for believing" that almost all older persons cannot perform adequately *or* that it is not practical to distinguish between those who can and those who cannot. *E.E.O.C. v. County of Santa Barbara*, 666 F.2d 373, 376 (9th Cir. 1982). See infra at 14.

safety in the public interest" should have been given. In *Harriss* the district court made a finding that Pan American had a duty to operate its business with the "highest degree of safety," 437 F. Supp. 413, 434 (N.D. Cal. 1977), and this circuit affirmed the findings as not clearly erroneous. *Harriss*, 649 F.2d at 675. Such an affirmance does not mandate the use of that phraseology in jury instructions.

Harriss does indicate the potential tension between the obligations of a public carrier to operate safely, and the requirement of the ADEA that an employer establish a BFOQ defense as "reasonably necessary." The district court struck a proper balance here by describing as the essence of Western's business "the *safe* transportation" of passengers and by reiterating within the same instruction that it was necessary that second officers over the age of sixty "perform their jobs *safely*" and that their job performance be "*safe* and efficient." (emphasis added). No more was required. As for the objection to the use of the term "normal," Western offered considerable evidence at trial dealing with emergencies. The jury was thus aware that the "normal" performance of the second officer's duties encompassed dealing with emergency situations.

With regard to Western's objections to the last three paragraphs, we turn again to *Harriss* and the second prong of the BFOQ defense which it adopted. Once it has been established that an employer's discriminatory requirement is "reasonably necessary," the employer must still show that,

> there is a factual basis for believing that all or substantially all persons over a certain age would be unable to perform the duties of the job safely and efficiently or that it is impossible or impractical to ascertain the difference between older employees who can and cannot perform the job safely.

E.E.O.C. v. County of Santa Barbara, 666 F.2d 373, 376 (9th Cir. 1982); *Harriss*, 649 F.2d at 676; *Tamiami*, 531 F.2d at 236; *see also EEOC v. County of Los Angeles, slip op. at 2495 (9th Cir. May 26, 1983)*. The final three paragraphs of the instruction meet this standard quite adequately. It was unnecessary and would have been improper to embody in the jury instructions the "medical rationale underlying the FAA's Age Sixty Rule" since the agency has never applied that rule to second officers, the only group against whom the BFOQ defense was raised. Western introduced evidence supporting its own contentions that the rule should be so applied, advanced that contention in cross-examination, and argued it to the jury. This instruction told the jury how to weigh the evidence. It should have done no more.

B. *The Denial of Judgment Notwithstanding the Verdict*

After the jury had returned its verdict for the plaintiffs, Western once again asserted its BFOQ defense in the form of a motion for judgment notwithstanding the verdict. Essentially the airline asked the trial court and now asks this court to set the safety standard "reasonably necessary" for it to observe at the level of "the highest degree of safety in the public interest," and then to reweigh the evidence which it presented below as to the functions performed by the second officer as one-third of what it styles the vital "pilot organism." Since we have already rejected the formulation of the safety standard Western advances, it remains only to determine whether the trial court properly denied judgment n.o.v. on the basis of current BFOQ law.

A trial court may appropriately grant judgment n.o.v. only when the evidence " 'viewed most favorably to the party against whom the motion is directed cannot support a verdict in that party's favor.' " *Naton v. Bank of California*, 649 F.2d 691, 697 (9th Cir. 1981) (citation omitted).

The standard of review at the appellate level is virtually identical; a verdict in the plaintiff's favor will be upheld if supported by substantial evidence. *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 290 (9th Cir. 1979), *cert. denied*, 447 U.S. 924 (1980).

Substantial evidence supports this jury verdict. The plaintiffs presented two well-qualified experts who testified that Western's age sixty policy was not necessary to assure that the tasks involved in the position of second officer would be performed safely. They testified further that present-day diagnostic techniques and the current level of medical knowledge make possible individual determinations of whether a second officer over sixty possesses the health and can maintain the safety standards necessary aboard a large commercial aircraft. Testimony about the effectiveness of Western's evaluations, check-ups and simulator training for individual second officers was before the jury, as well as testimony that there is always another flight crew member aboard who has been trained to perform the second officer's duties in the event of incapacitation. There was evidence that although there have been accidents arising out of pilot incapacitations, there has never been one caused by the disability of a second officer. The jury heard testimony that Western itself allows a captain under the age of sixty who cannot, for health reasons, continue to fly as a captain or co-pilot to downbid to a position as second officer. When the evidence showed all this, as well as the fact that half the pilots flying in the United States are flying for major airlines which do not require second officers to retire at the age of sixty, and that there are over 200 such second officers currently flying on wide-bodied aircraft, the trial court could not, as a matter of law, have determined that this jury was incorrect when it also decided that retirement at the age of sixty was not a BFOQ for second officers. The district court correctly denied the motion for judgment n.o.v.

III. The Other Jury Instructions

Western challenges a number of the other instructions given. The standard of review applicable is whether the giving or refusing of particular instructions, construed in the light of the instructions as a whole, was prejudicial. *Kelly v. American Standard, Inc.*, 640 F.2d 974, 985 (9th Cir. 1981); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 315 (6th Cir. 1975).

A. *Business Necessity*

Western challenges the trial court's business necessity instruction. Business necessity may be invoked as an affirmative defense to justify the retention of a rule that is apparently neutral but has a disparate impact on the basis of race, sex or age. Western's rule against downbidding had a disparate impact on younger and older pilots. Although it forbade the movement of both to lower positions, it operated also to deprive the older pilot of an opportunity for continued employment, while having no such effect on the younger pilot. Western attempted to justify its rule on the ground that the inferior position requested by the plaintiffs, that of second officer, could only *safely* be filled by someone less than sixty years of age. To reach its overall verdict, however, the jury must necessarily have determined that the age restriction on second officers was not supportable as a bona fide occupational qualification, a defense which Western asserted on the basis of this identical safety rationale. The jury finding deprives Western's only ground for claiming business necessity of any legitimacy, and renders Western's various objections to the wording of the business necessity instruction irrelevant.

B. *Reasonable Factors Other Than Age*

Western argues that the district court erred in instructing the jury that the defendant had the burden of proving "by a preponderance of the evidence" that its decision refusing

to allow Criswell and Starley to downbid to position of second officer was motivated by "reasonable factors other than age." It urges that instead the *McDonnell Douglas* test of articulation of "some legitimate, nondiscriminatory reason" should have been used. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Western confuses the elements of and burdens borne in the case-in-chief and those of an affirmative defense. The "reasonable factors" defense appears alongside the BFOQ exception in the ADEA, 29 U.S.C. § 623(f), and is an affirmative defense for which the employer bears the burden of proof.

> 29 U.S.C. § 623(f) provides *affirmative defenses* to an employer which in relevant part are as follows:
>
> (f) It shall not be unlawful for an employer, employment agency, or labor organization —
>
> (1) to take any action otherwise prohibited under [the sections specifying prohibited employer practices] . . . where the differentiation is based on *reasonable factors other than age*;
>
> . . . . . .
>
> (3) to discharge or otherwise discipline an employee for good cause.

Sutton v. Atlantic Richfield, 646 F.2d 407, 408 n.2 (9th Cir. 1981) (emphasis added). *See also E.E.O.C. v. County of Santa Barbara*, 666 F.2d 373, 375 & n.6 (9th Cir. 1982); *Marshall v. Baltimore & Ohio Railroad*, 461 F. Supp. 362, 372 (D.Md. 1978), *modified*, 632 F.2d 1107 (4th Cir. 1980), *cert. denied*, 454 U.S. 825 (1981); E.E.O.C. Guidelines, 29 C.F.R. § 1625.7(e) (1983) (". . . the employer bears the burden of showing that the 'reasonable factor other than age' exists factually."); Wage and Hour Division Guidelines, 29 C.F.R. § 860.103(e) (1982) (reasonable factors other than age exception "must be construed narrowly, and the burden of proof . . . will rest on the employer"); *see*

Udall v. Tallman, 380 U.S. 1, 4-18 (1965) (counseling deference to agency interpretations). *Cf. Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974) (under FLSA defendant claiming exception to statute has burden of proving exception).

We recognize that the Fifth Circuit's decision in *Marshall v. Westinghouse Elec. Corp.*, 576 F.2d 588 (5th Cir. 1978), is not in accordance with our analysis here. In the context of a disparate treatment claim, that court treated the reasonable factors other than age defense as an analog to the legitimate, non-discriminatory reason rebuttal developed in *McDonnell Douglas*. Since we do not believe that a statutory exception may be properly analogized to the second stage of the case-in-chief under a disparate treatment theory, we decline to follow the Fifth Circuit's reasoning.

Western's objection to treating the System Board decision as a "contention" rather than granting it greater weight is dealt with in the first section of this opinion; the trial court's decision was proper. The language of Instruction 30, which told the jury that Western's denial of the downbids because they violated specific provisions of the Pilot Agreement was a "reasonable factor other than age," was totally adequate.

Also within Instruction 30, the jury was instructed:

> [Y]ou must determine whether, taking the evidence as a whole, age was a substantial and determinative factor — in Western's refusal to allow either plaintiff to work as a Second Officer.

Western argues that the use of the phrase "a substantial and determinative factor" without further elaboration and definition was error since this court has recently held that the term is not self-explanatory. *Cancellier v. Federated Department Stores*, 672 F.2d 1312, 1316 (9th Cir. 1982), *cert. denied*, 103 S.Ct. 131 (1982); *Kelly v. American Standard*, 640 F.2d 974, 984-85 (9th Cir. 1981). The *Cancellier* court

said that a jury should be instructed to the effect that "age must 'make a difference' between termination and retention of the employee in the sense that, but for the presence of age discrimination, the employee would not have been discharged." *Id.* at 1316. The *Criswell* instructions did not elaborate upon the term except to add the word "substantial to the words 'determinative factor'." This was error. However, it was harmless in the same sense as the error in *Cancellier* was harmless:

> There is no indication in the proceedings that the outcome would have changed if the *Kelly* jury instruction had been given; to the contrary, it affirmatively appears from the record that the instruction did not prejudice the defendant. This case was not decided by a hairsbreadth. There was ample evidence that consideration of age "made a difference" in the termination of Cancellier. . . . Unlike the instructions given in cases requiring reversal which affirmatively stated an erroneous version of the law . . . or forbade the jury to consider what it properly should have considered . . . *the trial judge's instruction here was merely an unelaborated version of the correct standard.*

Id. (emphasis supplied) (citations omitted).

C. *Pretext*

Western challenges the pretext instruction which read:

> Even if you find for the defendant with respect to one or more of its defenses, plaintiffs may still prevail if plaintiffs show by a preponderance of the evidence that the reasons stated in defendant's case are merely pretexts for age discrimination. On this question, you are instructed that it is the plaintiffs' burden to persuade you that defendant's actions toward them [are] a pretext or cover-up for age discrimination; it is not defendant Western's burden to prove a contrary freedom from such illegal motivation.

The instruction is erroneous. As the case law has developed in this area, the term "pretext" has come to be used exclusively as identifying the third element of a discrimination case-in-chief attempting to prove disparate treatment. First, the plaintiff establishes the prima facie case. The burden then shifts to the defendant to show a "legitimate, nondiscriminatory reason for the employee's rejection." If the reason offered is both legitimate and nondiscriminatory, the plaintiff then must show that the stated reason is pretextual. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 & 804-05 (1973); *Douglas v. Anderson*, 656 F.2d 528, 531 (9th Cir. 1981).

Only when discrimination has been established does an affirmative defense come into play. For example, when the trier of fact is satisfied that the employer has intentionally discriminated, it turns to the affirmative defense of bona fide occupational qualification to determine whether or not the employer's conduct is justified on bases acceptable under the law. In a disparate impact claim, the trier of fact turns from the plaintiff's case-in-chief showing the discriminatory effect of a neutral rule to the affirmative defense of business necessity. Pretext plays no role in the fact-finder's analysis of a claimed affirmative defense. In some circumstances, the error committed here would be reversible. However, under the facts of this particular case, and reviewing against the *Kelly* standard, 640 F.2d at 985, we find the error harmless since it did not prejudice the defendant.

With regard to the downbidding claims of Captains Criswell and Starley, we must first distinguish between the disparate treatment and disparate impact theories advanced. Under the latter theory, plaintiffs alleged that even if Western had administered its rule against downbidding in a neutral fashion, such a rule would have impacted more harshly

on older pilots by subjecting them to the FAA-mandated retirement rule. Since proof of motive is not required in a disparate impact claim, the shifting burdens of *McDonnell Douglas* do not appear within the plaintiffs' case. However, an analogous process does occur in the affirmative defense to disparate impact, business necessity. If the employer establishes that his business purpose is legitimate and the challenged practice directly implements it, the plaintiff may produce evidence of alternative practices that would advance the employer's purpose with a lesser impact on the protected group. *Harriss*, 649 F.2d at 677; *Blake*, 595 F.2d at 1372. Until recently the term "pretext" was also used in the case law on occasion to classify the effect of such evidence, e.g.:

> If an employer does then meet the burden of proving that its tests are "job related," it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in "efficient and trustworthy workmanship." . . . Such a showing would be evidence that the employer was using its tests merely as a "pretext" for discrimination.

Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (citations omitted).[5]

Thus at the time the challenged instruction was given, the term "pretext" had not yet acquired its current status

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[5]Recently, in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252 (1981), the Supreme Court has clearly stated that it views the elements of the two causes of action, discriminatory impact and discriminatory treatment, as being distinctly different:

> In *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), we set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment.[5]

Footnote 5 reads:

> We have recognized that the factual issues, and therefore the character of the evidence presented, differ when the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes.

as a legal term of art. At least with regard to the disparate impact claim, the jury would therefore have understood the pretext instruction in one of two ways. First, it can be read as allowing plaintiffs an opportunity to establish that, despite the employer's success in justifying a neutral rule, in fact no neutral rule was used, and the claim could be analyzed as one of disparate treatment. Since plaintiffs here properly advanced both disparate impact and disparate treatment theories based on the same facts, no error would arise from this interpretation.

Alternatively, since a separate instruction already clearly placed the burden of proof on plaintiffs to establish discrimination, the jury could have understood the pretext instruction as requiring it to consider plaintiffs' rebuttal of the employer's affirmative defense. In connection with the other instructions, this instruction asked the jury to consider, first, whether the employer had, by its own evidence, convinced them of its defense, and then to consider whether the plaintiffs' evidence overcame that conviction and persuaded them that the employer's acts were not justified. While, with the benefit of hindsight, we can say that it would have been better for the court to have framed this weighing of the evidence in other terms, we cannot say that the employer was prejudiced by this formulation.

With regard to the disparate treatment claims, the jury could not have understood the instruction in the first way outlined above. The alternative analysis, however, is fully applicable. Moreover, in light of the specific contentions discussed below, the error was harmless.

We turn first to the claim of disparate treatment arising from the denial of downbids. The legitimate nondiscriminatory reason asserted by Western was that downbidding was generally prohibited, with a few carefully defined exceptions which were not applicable to Captains Criswell and

Starley. To show that this was a pretext, plaintiffs introduced evidence that hundreds of downbids by younger captains and first officers were permitted. Only if the jury found that the reason Western offered was pretextual would it have reached the affirmative defense of "reasonable factors other than age." And the "reasonable factor" would be the provisions of the Pilot Agreement, and the System Board determination that the parties to the agreement had not intended to allow downbidding in the circumstances presented by Criswell and Starley. Since the same contentions, when offered as a legitimate nondiscriminatory reason, would have been rejected as pretextual in the case-in-chief, it is inconceivable that the jury would have accepted the same information when offered as an affirmative defense. Had plaintiffs' pretext evidence, instead of showing that Western ignored limitations on exceptions when younger pilots were involved, gone to statements made specifically to them regarding the reasons for the denials, it might have been possible for a jury to find pretext within the plaintiffs' case-in-chief and at the same time to accept the employer's affirmative defense of reasonable factors other than age. Under the circumstances of this case, however, the error was harmless.

Finally, we turn to the disparate treatment claim asserted by all three plaintiffs, the required retirement of second officers at age sixty. The legitimate, nondiscriminatory reason asserted for their retirement was that of safety. In essence, Western argued that since captains and first officers are required to retire at age sixty by the FAA, and second officers are an integral part of that "pilot organism," the airline holds all of the members of the flight deck crew to the same high level of health and, to protect public safety, retires them together. To demonstrate that this was a pretext, the plaintiffs introduced evidence showing that Western per-

mits captains and first officers under the age of sixty who cannot meet the requirements of the physical exam for their positions to downbid and instead meet the less demanding physical requirements for the position of second officer. Western has permitted a captain of fifty-six to do this in order to continue flying. Therefore, before the jury reached the affirmative defense of bona fide occupational qualification, it would have had to accept this evidence of pretext. When it turned to the BFOQ defense, it would find that Western was arguing that a blanket retirement was "reasonably necessary" at age sixty since it was impossible to ascertain on an individual basis who could perform safely beyond that age and who could not. To find for Western on this defense, the jury would have had to accept the same argument which it had just rejected as pretextual in order to reach the defense at all. Therefore, once again the pretext instruction is harmless.

IV. Relief Granted

A. *Attorney's Fees*

The district court applied the twelve-factor test for determining reasonable attorneys' fees set out in *Johnson v. Georgia Highway Express*, 488 F.2d 714, 717-19 (5th Cir. 1974), and adopted by this circuit in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976). Western focuses its objections on the award of fees in an amount greater than that contracted for by plaintiffs. However, the statute authorizes payment of a reasonable fee, not the fee agreed upon by the parties and their attorneys. The fee agreed upon is therefore not decisive. *See, Sargeant v. Sharp*, 579 F.2d 645, 647-49 (1st Cir. 1978) ("[A] fee agreement is irrelevant to the issue of entitlement and should not enter into the determination of the amount of a reasonable fee." *Id.* at 649); *Clark v.*

American Marine Corp., 320 F. Supp. 709-11 (E.D. La. 1970), *aff'd*, 437 F.2d 959 (5th Cir. 1971); *Blowers v. Lawyers Cooperative Publishing*, 28 Empl. Prac. Dec. (CCH) ¶ 32,595 at 24,673-74 (W.D.N.Y. 1982).

The other objections to the award which Western raises here were considered carefully by the district court which made findings on the record. Abuse of discretion is the applicable standard, *Kerr*, 526 F.2d at 69; there was none here. We affirm the award of $313,309 to plaintiffs' attorneys.

Joan Celia Lavine, who acted as local counsel for one of the plaintiffs for a short period at the beginning of this litigation, has appealed the district court's award to her of $1,555 in attorney's fees. She contends that it is inadequate. Of the $31,012.50 which Lavine claims as the appropriate amount, over $10,000 was billed as preparation of the petition for fees. Her contentions are without merit. We therefore affirm both the district court's generous award of fees and its denial of costs to her.

B. *Prejudgment Interest*

The ADEA authorizes courts "to grant such legal or equitable relief as may be appropriate to effectuate the purposes" of the act. 29 U.S.C. § 626(b). In *Kelly v. American Standard*, 640 F.2d 974 (9th Cir. 1981), this court recognized that liquidated damages and prejudgment interest serve different functions in making ADEA plaintiffs whole. Liquidated damages are "a substitution for punitive damages and [are] intended to deter intentional violations of the ADEA." *Id.* at 979. Prejudgment interest is intended to compensate "the loss of use of this money during the period payments [are] withheld from [ADEA plaintiffs]." *Id.* at 982. The *Criswell* court recognized this difference in ordering relief. It awarded prejudgment interest only on the

portion of damages representing the plaintiffs' actual loss. 514 F. Supp. at 396. *Cf. Kelly*, 640 F.2d at 982 (interest awarded only on plaintiff's pecuniary loss, not on damages awarded for emotional distress). We therefore hold that the district court properly exercised its equitable powers by awarding the plaintiffs prejudgment interest on their back pay awards.

C. *The Permanent Injunction*

1. ALPA's Status in *Criswell*

In its answer and again after the jury verdict against it, Western raised the issue of whether ALPA was an indispensable party. On appeal, Western contends only that ALPA was a "necessary party" under Rule 19(a)(1) & (2), an argument which does not seem to have been directly made to the trial court, recognizing that a necessary party may be treated as an indispensable party under certain circumstances. *See Eldredge v. Carpenters 46, etc.*, 662 F.2d 534, 537 (9th Cir. 1981), *cert. denied*, 103 S.Ct. 231 (1982). Western argues, in effect, for the 19(b) appellate remedy: that the injunction against it should be vacated for absence of an "indispensable party." It contends that ALPA is indispensable because if Western is to conform to the court's order, its actions will cause it to breach its collective bargaining agreement with the union.

We reject the argument that the injunction should be vacated because of ALPA's absense. First, it is doubtful that ALPA is a necessary party under Rule 19(a) analysis. *See, e.g., Eldredge v. Carpenters 46, etc.*, 662 F.2d at 537-38. As the trial court stated, "This is an action against Western as an 'employer' under ADEA § 4(a) (§ 623(a)) and no relief has been sought against or rendered affecting ALPA as a 'labor organization.' ADEA, § 4(c), (623(c))." 514 F. Supp. at 396.

However, even if ALPA were a "necessary party," that only triggers the second step of the analysis:

> [I]f parties determined to be necessary under rule 19(a) cannot be joined, should the action in "equity and good conscience" be dismissed? Only if the court determines that the action should be dismissed is the absent party labelled "indispensable."

Eldredge, 662 F.2d at 537. Here, Western concedes that feasibility of joinder was not a problem, as indeed it illustrated in *Stone v. Western Airlines* when it brought ALPA into the action via a third-party complaint.

Moreover, Western makes no argument that ALPA was indeed indispensable, and when we look to the policies underlying denomination of parties as such, we find that ALPA simply does not qualify.

> Rule 19 is intended to protect the absentee from prejudice, to protect those made parties from harassment by successive suits, and to protect the courts from being imposed upon by multiple litigation.

C. Wright & A. Miller, *Federal Practice & Procedure* § 1609 at 92. First, ALPA is not prejudiced here; the organization apparently reached that conclusion itself when Western contacted it at the request of the court to inform it of the action and to inquire whether it wished to intervene. ALPA chose not to. Second, parties wishing to protect themselves from harassment, which is the gravamen of Western's complaint here, "must act for themselves." *Id.* Here Western did not seek to bring ALPA into the action itself, as it could have done, nor did it ask the court to order ALPA joined. In this regard it is important to remember that the rule contemplates a situation where a necessary party cannot be joined; that is not the situation here. Finally, the third criterion, avoidance of multiple litigation, has no application here since reversal "requires a second [hearing] while affirmance would end the matter." *Id.* at 93; *cf. Kaiser v. Local 83*, 577 F.2d 642 (9th Cir. 1978) (neither employer nor union is indispensable party in action against the other by employee-union member when action against employer is based on violation of terms of collective bargaining agreement and action against union is based on violation of duty of fair representation).

2. Systemwide Relief

Defendants contend that because this suit was not a class action filed pursuant to 29 U.S.C. § 216(b),[6] the permanent injunction which grants "class-wide" relief should be vacated on the ground that the court lacked jurisdiction to grant it. Western argues that relief instead should be limited to the individual plaintiffs.

This contention ignores the fact that to the extent that 29 U.S.C. § 216(b) is relevant, it controls only monetary awards. Injunctive relief has been granted here, a remedy approved by a number of courts in employment discrimination cases, despite the absence of a class certified under Rule 23 of the Federal Rules. As the Seventh Circuit has observed, the evil to be eliminated is discrimination on the basis of class-wide characteristics; and for this reason the interests of other members of the class are vindicated by the actual plaintiffs. *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 719-20 (7th Cir. 1969). In light of the special responsibility of the federal courts to effectuate the policies of the act, it is necessary to devise remedies which implement the act's policy as well as providing individual relief. *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1201 (7th Cir. 1971), *cert. denied*, 404 U.S. 991 (1972).

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[6]Incorporated by reference into the ADEA, 29 U.S.C. § 626(b); *Naton v. California*, 649 F.2d 691, 697 (9th Cir. 1981).

The *Bowe* and *Sprogis* courts were dealing with Title VII. But since the remedial purpose of the two acts is the same ("elimination of discrimination from the workplace," *Lorillard v. Pons*, 434 U.S. 575, 584 (1978), and because the injunctive powers under both statutes are similar in breadth (*compare* 29 U.S.C. § 626(b) *with* 42 U.S.C. § 2000e-5(g)), we hold that the same standards for class-wide relief should be applied in ADEA cases as are applicable under Title VII. *Accord, Marshall v. Goodyear Tire & Rubber Co.*, 554 F.2d 730 (5th Cir. 1977) (company-wide injunction appropriate where facts establish the existence of a policy which violates the ADEA). In this case, Western's actions regarding the plaintiffs were taken pursuant to a class-wide, age-based policy equally applicable to all flight deck crewmembers. The remedy must be co-extensive with the right. Once the district court had determined that the policy violated the ADEA, and here it found "clear and willful violations," system-wide injunctive relief was properly granted.

V. The *Stone* Appeal

Western concedes that its appeal of the reinstatement of Second Officer White in *Stone* is conditioned upon the outcome of its appeal in *Criswell*. Since we have affirmed both the equitable relief and the jury verdict of *Criswell*, we decline to vacate White's reinstatement.

Western appeals as well the denial of the injunctive relief which it sought against ALPA which would have allowed the airline to administer additional medical tests on the court-reinstated pilots over the age of sixty. ALPA opposed the motion on the grounds that such examinations would violate the collective bargaining agreement. The district court denied the motion, stating that it was best deferred until such

time as a record had been developed. We affirm that decision. Western seems to believe that the plaintiffs are required to prove that one or more methods of available medical testing are adequate to replace its age sixty rule. However, we are dealing here with the discriminatory treatment charge which was the central complaint of *Criswell;* the assertion that Western Air Lines discriminated in violation of the ADEA when it refused to allow *second officers* to fly beyond the age of sixty. Western's response to that count of the complaint was the affirmative defense of bona fide occupational qualification wherein the full burden falls upon the defendant to prove that age is the only criterion that will assure safe and efficient job performance. The district court held squarely in *Criswell* that Western had failed to carry its burden in that aspect of the case, and we have affirmed that ruling. The ruling in *Stone*, far from demonstrating "the bankruptcy of the *Criswell* 'record,' " in the entirely uncalled for language of the defendant, actually implements it quite accurately. Western previously failed to show that it could not conduct such examinations. That is all that was clearly established. If Western now feels that it must conduct examinations, it will be necessary for it to develop a record below demonstrating that the relief is warranted.[7] To grant an injunction at this point would be to do so on the mere assertion of necessity by a party. Equitable powers cannot be exercised at such behest.

In summary, we find that the trial court accorded the proper degree of deference to the System Board decision,

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[7] In this regard we note that more than 200 second officers over the age of sixty are now flying for major airlines in the United States. We note as well that defendant's expert conceded at the *Criswell* trial that the FAA-mandated examination system with which all Western second officers must comply is safe. We note finally that under the Pilot Agreement Western already performs additional medical and computer simulator evaluations which all second officers must pass whatever their age.

and correctly interpreted the law of the circuit in its denial of the motion for judgment notwithstanding the verdict. Of the challenges to the jury instructions, we find that the instructions were either correctly given or that the errors made were harmless. As for the relief issues, we affirm the awards of attorneys' fees and prejudgment interest, find that ALPA was not an indispensable party to the *Criswell* injunctive order and affirm that order for systemwide relief. Finally, we affirm the pretrial orders entered in *Stone*.

The district court is AFFIRMED.

Memorandum Opinion of District Court; Filed 5/12/81.

United States District Court, Central District of California.

Charles G. Criswell, Albert Ron, Rulon H. Starley, Plaintiffs, v. Western Air Lines, Inc., Defendant. No. CV 78-2184 AWT.

Filed: May 12, 1981.

Introduction

This is an action under Section 7 of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §626,[1] brought by two former captains and a second officer for damages and equitable relief, including reinstatement. The complaint alleges, in essence, that the refusal of defendant Western Air Lines, Inc. ("Western") to continue them in employment as second officers after their respective sixtieth birthdays was in violation of Section 4(a) of the ADEA (§623(a)).[2] All three plaintiffs sought preliminary injunctions *pendente lite*. The application of plaintiff Ron, who was then a second officer, was granted and those of plaintiffs Criswell and Starley, who were then captains, were denied. Thus, plaintiff Ron has been continued in his employment and plaintiffs Criswell and Starley have been retired since shortly after the commencement of this action.

Pursuant to plaintiffs' demand therefor, this matter was first tried to a jury. After a 15-day trial,[3] the jury returned

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[1]Parallel citations to the codification of the ADEA in Title 29, United States Code, will be by parenthetical reference to the codified section number only.

[2]Pendent state claims alleged in the complaint were dismissed prior to trial.

[3]An additional day of trial (an evidentiary hearing), the Court sitting without a jury, was held after the verdict was returned, where the parties were permitted to adduce any further evidence deemed relevant on the issues of whether or not equitable relief was proper and, if so, the scope of such relief.

verdicts for all three plaintiffs, assessing damages in the amounts of $50,393.87, $52,088.94 and $5,000, for plaintiffs Criswell, Starley and Ron, respectively. The jury further found that Western's violations of the ADEA were "willful" with respect to each plaintiff. ADEA, §7(b), (§626(b)).

The jury having performed its function, the Court must now address the issue of equitable relief.

The Prima Facie Case[4]

Plaintiff Criswell was involuntarily retired by Western in July 1978, upon attaining his sixtieth birthday. Prior to his retirement, Criswell had been employed by Western for 41 years, the last 37 of which was as a pilot. At his retirement and for a number of years prior thereto, Criswell had been a DC-10 captain. Prior to reaching his sixtieth birthday, Captain Criswell submitted a bid to become a DC-10 second officer. This bid was made in accordance with Western's established procedures which, to the extent applicable, conformed to the requirements of the collective bargaining agreement (the "Pilot Agreement") between Western and the Air Line Pilots Association ("ALPA"), the union which represented Western's flight deck personnel. On Western's wide-bodied aircraft (DC-10's) the second officer is the third member of the flight deck crew and is equivalent to a flight

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[4]The facts as set forth herein and in other sections of this memorandum opinion are intended to serve as findings of fact, pursuant to Rule 52(a), Fed. R. Civ. P. In this action seeking both damages and equitable relief, the question of whether or not the Court is required to accept the findings of the jury in making the specific findings of fact which will support the granting of equitable relief, *see, e.g., Cleverly v. Western Elec. Co.*, 450 F. Supp. 507, 511 (W.D. Mo. 1978), *aff'd*, 594 F.2d 638 (8th Cir. 1979), is moot because the court is in full agreement with the jury insofar as its verdict may govern findings necessary for equitable relief and because the verdict was a general verdict only, none of the findings herein conflict with the jury's verdict.

engineer, as that term is employed by the Federal Aviation Administration ("FAA").

Captain Criswell's bid was rejected by Western, not because there were no second officer openings or because none were contemplated or for any other reason normally associated with consideration of bids by flight deck personnel, but *solely* because he was approaching age 60 and because Western had a policy which required all flight deck personnel to retire at age 60.

Plaintiff Starley was also involuntarily retired by Western at age 60 in July 1978. The circumstances of his retirement, however, are even more explicitly age-related and deserve recounting because they clearly indicate that Western, beyond any doubt, has enforced a mandatory retirement rule at age 60 for all flight deck personnel.

Starley had been employed by Western as a pilot or co-pilot for 32 years and had been a DC-10 captain for the last five years prior to his retirement. One year prior to his sixtieth birthday, Captain Starley learned that Western would soon have DC-10 second officer openings, resulting from the acquisition of new aircraft. After discussing the matter with Western's Vice President for Flight Operations, Captain Starley, in September 1977, submitted a bid for a DC-10 second officer position. In the following month, the bid was actually awarded to Captain Starley and he discussed with Western personnel the training normally given by Western to flight deck personnel who move from one position to another. In February 1978, Western changed its position and, claiming that the position had been awarded to him in error, informed Captain Starley that he would be retired at age 60, which was the normal retirement age set forth in its pilot pension plan negotiated with ALPA.

Plaintiff Ron, whose sixtieth birthday was in June 1978, is a "career" second officer with Western, neither having

been required to nor chosen to advance to first officer (co-pilot) or captain (pilot). He has been employed by Western since 1945 and as flight engineer or second officer since 1954. He, too, discussed staying on with Western with its management personnel and in December 1977 gave Western written notice of his intention to remain past his sixtieth birthday in his then position of DC-10 second officer. In February 1978, Western informed Ron, as it had Starley, that he would be retired at the normal retirement age of 60 under the pilot pension plan.

As indicated earlier, a preliminary injunction was issued in Ron's favor, prohibiting Western from terminating his employment as a second officer pending the outcome of this lawsuit. Plaintiff Ron has, thus, continued to fly the line for Western as a DC-10 second officer during the two and one-half years between the commencement and trial of this action. He has continued to perform all of the normal duties of DC-10 second officer on both domestic and international flights efficiently, without untoward incident and without any complaint from flight operations management respecting his job performance.

Given the facts summarized above, Western conceded that plaintiffs had established a *prima facie* violation of the ADEA. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Kelly v. American Standard, Inc.*, 640 F.2d 974, 980 (9th Cir. 1981). Western's case, rather, was predicated on two statutory defenses. Its first defense was that retirement of second officers at age 60 was a "bona fide occupational qualification reasonably necessary to the normal operation" of its business ("BFOQ"). ADEA, §4(f)(1), (§623(f)(1)). Its second defense was that its policy of not allowing captains to "downbid" to second officers was "based on reasonable factors other than age." *Id.* This defense, which was asserted against plaintiffs Criswell and

Starley only, was combined with the non-statutory "business necessity defense" ("BND"). *See Harriss v. Pan American World Airways, Inc.*, No. 78-1214, slip op. at 608 n.2 (9th Cir. Dec. 30, 1980). All of these defenses were overlaid with a special gloss applied in cases involving public carriers which "have uniformly recognized the relevance of the safety factor" in assessing the justification for these defenses.[5] *E.g., Id.* at 610 & n.4; *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 (5th Cir. 1976). We turn then to an analysis of Western's defenses.

The BFOQ Defense

Western's BFOQ defense has its genesis in the FAA's Age 60 Rule, 14 CFR §121.383(c). This rule prohibits certificated air carriers, such as Western, from employing pilots or copilots past age 60. It is based on the FAA's determination that the onset of disease and other debilitating conditions is age-related and that there is no practical way of predicting in pilots over age 60 on an individual basis whether such a disease or condition which would pose a flight or safety risk would occur. This exercise of the FAA's discretion, based on its special expertise, has been upheld by the courts. *See, e.g., Keating v. FAA*, 610 F.2d 611 (9th Cir. 1979). The Age 60 Rule has also been recognized as a BFOQ for commercial airline pilots and copilots.[6] The rule, however, by its own terms, has no application to flight engineers. Western's contention is that the same reasons

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[5] In this case, the presence of the safety factor is predicated on Western's statutory duty, as a certificated air passenger carrier, to render its services "with the highest possible degree of safety in the public interest. . . ." 49 U.S.C. §1421(b).

[6] 29 CFR §860.102. One court has applied this rule, by analogy, to non-commercial pilots, concluding that as a matter of law a mandatory retirement age of 60 for such pilots was a BFOQ. *Tuohy v. Ford Motor Co.*, 490 F. Supp. 258 (E.D. Mich. 1980).

which support the Age 60 Rule for pilots support its application by Western to its second officers.

As might be expected, testimony on this subject was conflicting. Western relied primarily on the expert opinion of a former FAA Deputy Federal Air Surgeon. His testimony was that the onset of at least certain diseases is age-related, that with advancing age the likelihood of onset of disease increases and that in persons over age 60 it could not be predicted whether and when such diseases would occur. In particular, he was concerned with the occurrence of a cardiovascular event, such as a miocardial infarction, in flight.

On the other hand, plaintiffs' experts, a medical doctor of aerospace medicine and aging and a professor of psychiatry, specializing in the psychology of aging, cognition and gerontology, testified to the contrary. In their opinion, physiological deterioration is not caused by nor does it necessarily accompany aging between the ages of 60 and 70. There are a number of healthy individuals older than age 60 and it is not unusual for an individual over age 60 to be healthier than a much younger person. Deterioration is caused by disease and not by aging. The aging process itself, which commences at conception, occurs at different rates in different individuals and the differences which result from these differential rates becomes increasingly pronounced in increasingly older age groups. Plaintiffs' expert on aerospace medicine also testified that it was feasible to determine on the basis of individual medical examinations whether flight deck crew members, including those over age 60, were physically qualified to continue to fly.

The jury's verdict is consistent with a finding that application of the Age 60 Rule to Western's second officers was not reasonably necessary to the essence of its business, that Western did not have a sufficient factual basis for believing that second officers past age 60 would be unable to

perform their duties safely and efficiently and that it was not highly impractical to deal with second officers past age 60 on an individual basis.[7] *See Harriss, supra* at 611. The court concurs in this finding.[8]

This finding, that Western did not carry its burden of proof on the BFOQ defense, is also supported by non-medical evidence. First, a distinction must be made between the duties of a flight engineer, on the one hand, and the duties of a pilot (including copilot), on the other. On a wide-bodied aircraft the flight engineer sits at his own instrument

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[7]The BFOQ instruction stated:

> "*BFOQ Defense*. If you find that plaintiffs have persuaded you by a preponderance of the evidence that their involuntary retirements were the result of policies in which age discrimination was a determining factor, then you must consider defendant's defense that age is a 'bona fide occupational qualification' for its Second Officers (flight engineers). This defense is usually abbreviated 'BFOQ'. The BFOQ defense is available only if it is reasonably necessary to the normal operation-essence-of defendant's business. In this regard, I instruct you that the normal operation-essence-of Western's business is the safe transportation of air passengers.
>
> "The burden of proof to show a BFOQ is on the defendant. If defendant establishes such a BFOQ by a preponderance of the evidence, then its age discrimination is lawful under the ADEA.
>
> "One method by which defendant Western may establish a BFOQ in this case is to prove
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> "(1) that in 1978, when these plaintiffs were retired, it was highly impractical for Western to deal with each Second Officer over age 60 on an individualized basis to determine his particular ability to perform his job safely, and
>
> "(2) that some Second Officers (flight engineers) over age 60 possess traits of a physiological, or other nature which preclude safe and efficient job performance that cannot be ascertained by means other than knowing their age.
>
> "In evaluating the practicability to defendant Western of dealing with Second Officers over age 60 on an individualized basis, with respect to the medical testimony you should consider the state of the medical art as it existed in July 1978."

[8]In making this and its other findings on Western's defenses, the Court is mindful that it is only the burden of proof and not the ultimate burden of persuasion that shifts to the defendant. *Texas Dept. of Community Affairs v. Burdine*, 101 S. Ct. 1089, 1094-95 (1981).

panel. His function during normal flight is to monitor and adjust a number of the systems which are necessary to the operation of the aircraft, such as the hydraulic and electrical systems. He does not manipulate the flight controls. Thus, his normal duties are less critical to the safety of flight than those of a pilot. He does have important contingency duties in emergency situations, such as an all-engine flameout. Even if the flight engineer were to become incapacitated in flight, the crew redundancy concept employed by Western and other carriers provides for other members of the flight deck crew to perform the necessary procedures of the flight engineer until the aircraft can be landed at the nearest available airport. Although testimony at the trial indicated that a number of tragedies have resulted from pilot incapacitations during flight, none has ever come about because of the incapacitation of a flight engineer.

The record also reveals that both the FAA and the airlines have been able to deal with the health problems of pilots on an individualized basis. Pilots who have been grounded because of alcoholism or cardiovascular disease have been recertified by the FAA and allowed to resume flying. Pilots who were unable to pass the necessary examination to maintain their FAA first class medical certificates, but who continued to qualify for second class medical certificates were allowed to "downgrade" from pilot to second officer. There is nothing in the record to indicate that these flight deck crew members are physically better able to perform their duties than flight engineers over age 60 who have not experienced such events or that they are less likely to become incapacitated. *Harriss, supra*, at 615-16 (Schroeder, J., dissenting).

As indicated earlier, the Age 60 Rule has never been applied by the FAA to flight engineers. Western's expert testified that during the period that he was the Deputy Fed-

eral Air Surgeon, he never recommended or advocated that it be so applied. A number of other commercial air carriers, including American, TWA and Pan American, have flight engineers older than age 60 flying the line. The evidence indicates that there are in excess of 200 such flight engineers on wide-bodied aircraft. Taking the airline pilot population as a whole, approximately one-half of them are employed by carriers which do not impose an Age 60 Rule on flight engineers.[9]

Based on all of the factors discussed above, I find from the record in this case that retirement at age 60 for second officers, or flight engineers, is not a bona fide occupational qualification reasonably necessary to the normal and safe operation of Western's business.

BND/Reasonable Factors Other Than Age Defense

Western claimed that rejection of Criswell's and Starley's bids to become DC-10 second officers was the result of a facially neutral "downbidding" policy. In response to plaintiffs' showing that this downbidding policy had a disparate impact on 59 year old captains, Western responded that the policy was necessary to the safe and efficient operation of its business. For essentially the same reasons, Western further claimed that its refusal to accept these downbids was based on reasonable factors other than age.

All of Western's pilots and flight engineers, both in active service and on furlough, are carried on a pilot seniority list.[10] Under the Pilot Agreement, all line assignments are

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[9]With respect to pilots, it is somewhat of an irony that the FAA does not apply its Age 60 Rule to its own pilots who fly that agency's fleet, which consists of aircraft as large as B-707's. The U.S. Navy, based on its "1000 Aviator Study," has recently rescinded its age limitation policy for pilots.

[10]For purposes of seniority, pilots and flight engineers are all treated as pilots, *i.e.*, they are all carried on a single, integrated list.

made according to seniority. Seniority is established by a pilot's date of hire as a pilot. At the time of their retirements, Criswell and Starley were at or near the top of the pilot seniority list and, thus, entitled to bid preference. A number of variables enter into pilot assignments including home base, type of aircraft, cockpit position and assigned flights. Whenever a line vacancy opens, *e.g.*, a DC-10 captain based in Honolulu or a B-727 first officer based in Los Angeles, the vacancy is posted and bids for the position are accepted from all pilots on the seniority list. Normally, the vacancy is awarded to the pilot highest on the seniority list who has made a bid for the position. Because the higher the position and the larger the aircraft, the greater will be the salary, naturally, most bids are to bid upward in order to improve the bidding pilots' economic position. This seniority system has resulted in the more experienced pilots flying the more important positions and the larger aircraft. Another result of this seniority system is that the only positions available for new pilots, *i.e.*, those not already on the seniority list, are lower positions on narrow-bodied aircraft.

Western refers to this seniority system as its "up or out" system. In fact, Western requires its new second officers to become qualified as pilots within a certain period of time. If a pilot cannot or will not advance when openings are available, he or she will be terminated.[11] Western views this system as a means of training its pilots for the more important positions, as a pilot will normally be required to attain a number of years of service flying the line for Western as a pilot before becoming eligible to be a DC-10 captain.[12]

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[11]As stated earlier, by agreement with ALPA, an exception to this up or out policy is a group of career second officers, including plaintiff Ron, who have been permitted to remain as second officers and not advance to first officer or captain.

[12]Whatever else may accompany or result from the aging process, the parties agree that as a part of the maturation process a pilot's judgment improves with age.

It is, thus, Western's position that under its seniority system and up or out system "downbids" are the exception rather than the rule and that the Criswell and Starley downbids do not fall within any recognized exception. Therefore, that its refusal to accept their downbids was justified under the BND and was the result of reasonable factors other than age.[13]

Western contends that its downbid policy permits downbids only in a few and carefully controlled circumstances. A "downbid," as implied above, is a pilot bid to move from one cockpit position to a lower position, *e.g.*, from captain to first officer, or to move in the same position from a larger to a smaller aircraft (a downbid within status), *e.g.*, from DC-10 captain to B-727 captain. The Criswell and Starley downbids here involved were from DC-10 captain to DC-10 second officer. These downbids were, in fact, the subject of grievances filed under the Pilot Agreement and were arbitrated by the Western Airlines Pilots System Board of Adjustment. Western's denial of these downbids was held by the System Board not to have been in violation of the Pilot Agreement, based on its finding that Western was opposed in principle to downbidding and permitted it "only in rare and carefully defined circumstances."[14]

The evidence at trial, however, belied this contention. Western has permitted, and in certain circumstances required, downbidding in hundreds of instances in a wide

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[13]It is recognized that plaintiffs Criswell and Starley had no right to retain their positions as DC-10 captains under the Age 60 Rule and that Western was not obligated to offer them new positions where none existed upon their attaining age 60. Thus, the gist of their ADEA claim is that Western refused to award them second officer bids where such positions were available prior to their reaching age 60 and to which they were entitled by virtue of their positions on the pilot seniority list.

[14]The awards of the System Board and the opinion of its neutral arbitrator were admitted into evidence to be "accorded such weight as the court seems appropriate." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 & n.21 (1974).

variety of circumstances and almost without exception by younger pilots. The only circumstances in which Western has consistently denied downbids is by captains nearing age 60. During the period 1972 to 1979, Western has permitted downbids by or involuntarily downgraded[11] more than 400 pilots. These included pilots downbidding from captain to first officer, from captain to second officer and from first officer to second officer, as well as downbids within status. Of special signficance to this case is Western's policy, instituted in 1975, of medical downgrades. Under this policy a captain or second officer who cannot hold a FAA first class medical certificate but can hold a second class medical certificate is permitted to continue flying the line as a second officer. Four pilots have been downgraded by Western under this policy including a DC-10 captain who became a second officer at age 56. Downgrades also have occurred as a result of "displacements," which are caused by curtailment of flights and flying time and consequent downward "bumping" by senior pilots whose flights have been cancelled. Testimony indicated that at least on one occasion a displaced DC-10 captain who was high enough on the pilot seniority list to continue to hold on to a DC-10 captaincy was allowed to assume a DC-10 second officer position.

Numerous downbids have also been exercised under the wide-body downbid provision of the Pilot Agreement. These are downbids which a pilot exercises in order to obtain a position on a wide-bodied aircraft. There is no restriction on the number of times a pilot can exercise such a downbid and a number of pilots have done so more than once. There was evidence also of a number of downbids permitted by Western, such as "hardship" downbids, which are not sanc-

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[11]A "downgrade" has the same effect as a downbid; it is, however, not voluntarily initiated by the pilot.

tioned by any provision in the Pilot Agreement, as is the case with disciplinary downgrades.

It is clear from the above evidence that Western's downbidding policy is not one of allowing downbids in only a few exceptional circumstances, but has sanctioned hundreds of downbids in a wide variety of circumstances, including downbids and downgrades for reasons of health and unilateral downbids not approved by ALPA or the Pilot Agreement. This downbid policy was administered in such a way as to have a disparate impact on pilots nearing their sixtieth birthday.

For these reasons, I find that Western's refusal to accept Captain Criswell's downbid to DC-10 second officer and its rejection of Captain Starley's downbid after it had been accepted, were not based on "reasonable factors other than age" and, in fact, such action was taken substantially and primarily because Criswell and Starley were approaching their sixtieth birthdays. Western had a policy of retiring all flight deck personnel — whether pilots or flight engineers — at age 60 and Western's actions in rejecting these downbids was in accordance with and motivated by that policy. Thus, although, as indicated earlier, substantial evidence supports the claim of Criswell and Starley of disparate impact and Western's BND lacks any substantial evidentiary basis, because of this finding that age was a substantial and determinative factor in Western's action in denying these downbids, the BND must also fail for this reason. I find that Western did not carry its burden of showing that the denial of the Criswell and Starley downbids were "necessary to the safe and efficient . . . performance" either of Western's business of safe transportation of air passengers or of the duties of second officers. *Dothard v. Rawlinson*, 433 U.S. 321, 332 n.14 (1977); *Harriss, supra* at 614.

Pretext

Although evidence was received at the trial on plaintiffs' claim of pretext and the jury was instructed on this element, in view of the foregoing findings regarding the *prima facie* case and the defenses of BFOQ and BND/Reasonable Factors Other Than Age, for purposes of determining the scope of equitable relief, I conclude that it is unnecessary to make any findings on this issue.

Right to Jury Trial

In this case, the jury was asked to return only a general verdict with respect to each plaintiff's claim (in addition to answering a special interrogatory with respect to willfulness). For this reason, Western contends that the Court cannot order equitable reinstatement of plaintiffs without depriving Western of its right to jury trial under the ADEA. Because the jury was instructed on pretext, Western argues that it is possible that the jury may have accepted either or both of its defenses, but found that they were pretextual and returned its general verdict in plaintiffs' favor on this basis.

The statute provides that in ADEA actions

> "a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action."

ADEA, §7(c)(2), (§626(c)(2)). The statute grants a right to trial by jury "of any issue of fact in any such action for recovery of amounts owing." I interpret this as a grant of the traditional right to jury trial, *i.e.*, on all issues of fact necessary to the recovery or non-recovery of damages. So long as the jury is permitted to first exercise its fact finding powers, the Court is then entitled — indeed, required — to make its factual determinations, at least insofar as its findings are not inconsistent with the verdict. *Bruckman v. Hollzer*, 152 F.2d 730 (9th Cir. 1946). Nothing in this 1978 amendment to the statute or its legislative history suggests that Congress intended to disturb this long-standing division of fact finding duties between the jury and the court in an action where both damages and equitable relief are proper.

Indeed, the legislative history makes clear that Congress' only intent in enacting the 1978 amendment was to insure the right to jury trial on all issues necessary for "legal relief." The amendment was occasioned by the Supreme Court's decision in *Lorillard v. Pons*, 434 U.S. 575 (1978), which upheld the right to jury trial in an ADEA action for lost wages. However, the right to jury trial on a claim for liquidated damages was left open and it was this narrow question that was addressed by the amendment.

> "The House recedes with an amendment which provides for a jury trial on any issue of fact in an action for recovery of amounts owing as a result of a violation of the ADEA.
>
> * * *
>
> "Because liquidated damages are in the nature of legal relief, it is manifest that a party is entitled to have the factual issues underlying such a claim decided by a jury. . . ."

House Conf. Rep. No. 95-950, pp. 13-14, *reprinted in* [1978] U.S. Code Cong. & Ad. News 528, 535.

For these reasons, I reject Western's contention that because special interrogatories were not submitted to the jury, the Court is powerless to decide plaintiffs' equitable claims.

Scope of Equitable Relief

Willful violations of the ADEA having been established, the Court must now consider the appropriate equitable relief to be granted. Based upon its legislative findings, Congress

declared the purpose of the ADEA is "to promote employment of older persons based on their ability rather than age" and "to prohibit arbitrary age discrimination in employment." ADEA, §2(b), (§621(b)). The Court's equitable decree must be fashioned to fully effectuate these statutory purposes.

A permanent injunction will, therefor, be issued requiring plaintiffs Criswell and Starley to be reinstated by Western, such reinstatement to be with full seniority on the pilot seniority list, as of their original dates of hire as pilots. Because, given this standing in seniority, Criswell and Starley were entitled to have their DC-10 second officer bids accepted, they shall be immediately returned to Western's payroll at salaries fully reflecting their positions and seniority. Plaintiffs Criswell and Starley shall then be afforded such customary training as is given by Western to flight deck personnel similary situated (*i.e.*, DC-10 captains downbidding or downgraded to DC-10 second officers). Upon the successful completion of such training, they shall be permitted to select such DC-10 second officer positions as they would have been entitled to if they had not been involuntarily retired.

In connection with the reinstatement of Criswell and Starley, the Court has considered Western's claim that such reinstatement will cause displacement of less senior pilots and the ultimate furlough of the two active pilots at the bottom of the pilot seniority list. Although such a result is unfortunate and may be inevitable in a shrinking economy, the Court must assume that such a possibility was within the contemplation of Congress in enacting the ADEA. Such displacement is not a sufficient reason not to fully effectuate the ADEA. *Cf. Franks v. Bowman Transp. Co.*, 424 U.S. 747, 778-79 (1976).

Pension Rights

Plaintiffs contend that their reinstatement and Ron's continued employment should be, in order to fully effectuate the ADEA's purpose, with full pension benefits under the Pilot Pension Plans.

The Pilots Variable Pension Plan is a defined contribution plan and plaintiffs' reinstatement should be with full rights under this plan. Western will be ordered to make the contributions to this plan on behalf of plaintiffs Criswell and Starley as if they had continued as DC-10 second officers from the dates of their respective sixtieth birthdays. Western is also to restore to these plaintiffs' accounts all sums paid out of the Variable Plan to them since their respective sixtieth birthdays, because the jury was instructed to deduct these payments on calculating its back pay awards. Plaintiff Ron's Variable Plan account has been undisturbed because of the preliminary injunction and should remain so.

With respect to the Pilots Fixed Pension Plan, a more difficult question is presented. The normal retirement age under this plan is 60. This is a defined benefit plan and with respect to such plans, Department of Labor interpretive regulations provide:

> "A defined benefit plan need not provide for the accrual of benefits for an employee who continues to work after normal retirement age."

29 CFR §860.120(f)(1)(iv)(B)(5).

Based on this provision, plaintiffs virtually concede and the Court concludes that plaintiffs are not entitled to any increases in their Fixed Plan pensions which might result from benefit accruals based on additional years of service or other credits. The regulations further provide:

> "A defined benefit plan need not take into account salary increases and benefit improvements under the

> plan which take place after an employee reaches the normal retirement age specified in the plan with respect to those employees continuing their employment beyond that age. However, benefit improvements for retirees may not be denied to such employees who do not receive the advantage of benefit accruals and increases given younger employees."

29 CFR §860.120(f)(1)(iv)(B)(7).

Based on the second sentence of this latter provision, however, plaintiffs contend that they are entitled to any increase in the "Minimum Normal Pilot Pension" which becomes effective between their sixtieth birthdays and their actual retirement dates. In fact, one such increase has already been made and it appears that for most pilots the negotiated minimum exceeds the "normal" or accrued pension benefit. Plaintiffs contend that this is a "benefit improvement" under the second sentence of §860.120(f)(1)(iv)(B)(7). However, that sentence refers only to such improvements for "retirees." Benefit improvements which apply to "employees" are governed by the first sentence. Plaintiffs, after reinstatement, will be employees and not retirees. Therefore, I conclude, giving deference to the administrative agency's interpretive regulation, *see* 29 CFR §860.1, that under the statute, ADEA, §4(f)(2), (§623(f)(2)), plaintiffs are entitled to neither additional accrued benefits after age 60 nor benefit improvements negotiated for employees under the Fixed Plan which become effective after their sixtieth birthdays.

Under this interpretation of the ADEA and the regulations, plaintiffs were entitled to commence receiving Fixed Plan pension benefits on their sixtieth birthdays. The jury, however, was instructed (Instruction No. 34) that "any amount received under the Western-ALPA Fixed and Variable Pilot Pension Plans" should be deducted from the

wages which plaintiffs lost. The economic effect of this instruction was to leave plaintiffs Criswell and Starley in the same position as if they had never commenced receiving Fixed Plan pension benefits and the Court's decree should take this into account.

Western will be ordered to restore to the Fixed Plan pension trust an amount equal to all Fixed Plan pension benefits paid to plaintiffs Criswell and Starley. Each plaintiff shall elect whether to commence receipt of Fixed Plan benefit payments retroactive to his sixtieth birthday or upon his actual retirement. Any election of retroactive commencement of Fixed Plan pension payments shall be at the statutory interest rate of seven percent (7%) per annum from accrual to payment. If any plaintiff elects deferral of Fixed Plan benefits to his actual retirement date, his benefits shall be actuarially adjusted to reflect the shorter life expectancy resulting from such deferred commencement.

Adjustment of Damages

Plaintiffs ask that further damages be awarded by the Court for lost wages between the time of the verdict and the judgment to be entered pursuant hereto. This Circuit now appears to have approved the use of the district court's equitable powers under ADEA, §7(b), (§626(b)), to adjust a jury's award of damages when necessary to give complete relief. *Kelly v. American Standard, Inc., supra*, 640 F.2d at 982, 985-86; *see also, Loeb v. Textron, Inc.*, 600 F.2d 1003, 1020 (1st Cir. 1979). Plaintiffs' request, therefore, is granted as necessary to make the plaintiffs whole. However, plaintiffs further request for the doubling of additional actual damages which have accrued since the return of the verdict will be denied. "[L]iquidated damages is in effect a substitution for punitive damages and is intended to deter intentional violations of the ADEA." *Kelly v. American*

Standard, Inc., supra, 640 F.2d at 979. Further liquidated damages are here inappropriate because the delay in the judgment was caused by the necessity for the Court to consider the equitable issues and is not the fault of defendant.

Kelly v. American Standard, Inc., supra, 640 F.2d at 982, authorizes the award of prejudgment interest under the court's equitable powers under the ADEA, §7(b), (§626(b)), because "the loss of use of this money [unpaid wages] during the period payments were withheld . . . should be compensated by payment of interest." The court there approved application of the statutory interest rate under state law. *Id.* For this reason, plaintiffs shall recover prejudgment interest at the California statutory rate of seven percent. Cal. Const., Art. 15, §1; Cal. Civ. Code §1916-1. Prejudgment interest shall be payable only on actual damages, as herein adjusted, and shall not be subject to doubling under ADEA §7(b), (§626(b)) and 29 U.S.C. §216(b).

Systemwide Relief

Plaintiffs, in their proposed judgment [Revised], request, in effect, systemwide relief; that is, that Western be enjoined generally from refusing to permit flight deck crew members from continuing to work as second officers after age 60. Defendant contends that such broad relief is inappropriate because this is not a class action and the only relief sought and necessary is with respect to these individual plaintiffs.

The ADEA incorporates the Fair Labor Standards Act's "opt-in" procedure. ADEA, §7(b), (§626(b)); 29 U.S.C. §216(b). Although this would appear to restrict the availability of class actions, at least for damages, in ADEA cases, *see Naton v. Bank of California*, No. 78-1059, slip op. at 1887 (9th Cir. May 4, 1981), a number of courts have approved class-wide injunctive relief in employment discrimination cases, despite the fact that no class had been

certified under Rule 23, Fed. R. Civ. P. Thus, it was observed in *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 719 (7th Cir. 1969), that a Title VII suit is "necessarily" a class action "as the evil sought to be ended is discrimination on the basis of class characteristics. . . ." For this reason, the interests of other members of that "class" are at stake, whether or not a class has been certified, "and the court has a special responsibility in the public interest to devise remedies which effectuate the policies of the Act as well as afford private relief to the individual employee instituting the complaint." *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1201 (7th Cir. 1971), *cert. denied*, 404 U.S. 991 (1972) (citations omitted). *See also, Brito v. Zia Co.*, 478 F.2d 1200, 1207 (10th Cir. 1973); *Aros v. McDonnell Douglas Corp.*, 348 F. Supp. 661, 663 (C.D. Cal. 1972) (Ferguson, J.).

Because the remedial purpose of both Title VII and the ADEA are the same, "elimination of discrimination from the workplace," *Lorillard v. Pons, supra*, 434 U.S. at 584, and because the injunctive powers under both statutes are similarly broad, *compare*, ADEA, §7(b), (§626(b)), *with* 42 U.S.C. §2000e-5(g), I conclude that the same standard for class-wide relief should be applied in ADEA cases as are applicable under Title VII. I concur with the jury's finding that the violations here were willful. The retirements of plaintiffs Criswell and Starley and the threatened retirement of plaintiff Ron were pursuant to Western's policy to require all flight deck personnel, including second officers, to retire at age 60. Clear and willful violations of the ADEA having been established, a permanent injunction shall issue prohibiting any future violations directed to the same discrimination in the workplace.

The Position of ALPA

Belatedly, after verdict, Western renewed its contention that ALPA is an indespensible party and that its absence renders the trial a nullity. This is an action against Western as an "employer" under ADEA, §4(a), (§623(a)), and no relief has been sought against or rendered affecting ALPA, as a "labor organization." ADEA, §4(c), (§623(c)). No requirement under Rule 19, Fed. R. Civ. P., compelled joinder of ALPA in this action. This contention is wholly without merit.

The one area which might implicate the Pilot Agreement, and thus ALPA, is medical testing. Western contends that the Pilot Agreement prohibits its requiring a more stringent medical examination than required for an FAA second class airman's certificate. Plaintiffs contend, citing an Opinion Letter from the Wage and Hour Administrator, 2 Empl. Prac. Guide [CCH] ¶5114 (Oct. 30, 1978), that the ADEA prohibits a more stringent medical examination requirement for plaintiffs than for younger pilots.

Plaintiffs' case was largely based on their medical expert's opinion that appropriate, individualized medical procedures were now available. Thus, Western's BFOQ defense failed because, under the *Tamiami* test, *supra*, 531 F.2d at 235, (*see* footnote 7, *supra*), it failed to carry its burden of proof that dealing with age 60 second officers would not be practical on an individualized basis. It would be ironic if Western were now to be prohibited from such individualized examinations. Therefore, pending Western's renegotiation of the Pilot Agreement with ALPA, Western will be permitted under the decree to administer, at its expense, appropriate medical examinations, in addition to the second class airman's examination, to second officers age 60 and older. At the next labor negotiations with ALPA on

the Pilot Agreement, Western will be free to bargain for the right to require such medical examinations as it thinks are necessary and appropriate in order to discharge its responsibility as a certified air carrier.

Attorneys' Fees

Plaintiffs, having prevailed at trial, are entitled to an award of reasonable attorneys' fees. ADEA, §7(b), (§626(b)); 29 U.S.C. §216(b); *Kelly v. American Standard, Inc., supra*, 640 F.2d at 986 & n.21. Plaintiffs shall file their application for reasonable attorneys' fees, including full and detailed back-up data, *Id.*, within 30 days hereof.

Dated: May 12, 1981.

/s/ A. Wallace Tashima
A. WALLACE TASHIMA
United States District Judge

Final Judgment and Permanent Injunction; Filed 5/12/81.

United States District Court, Central District of California.

Charles G. Criswell, Albert Ron, Rulon H. Starley, Plaintiffs, v. Western Air Lines, Inc., Defendant. No. CV 78-2184 AWT.

Filed: May 12, 1981.

This action came on for trial before the Court and a jury and the issues having been duly tried and the jury having duly rendered its verdict and the Court having signed and filed its findings of fact and conclusions of law in the form of a memorandum opinion, pursuant to Rule 52(a), Fed. R. Civ. P.,

IT IS ORDERED, ADJUDGED AND DECREED:

A. *Money Judgments*

1. *Plaintiff Criswell.* The jury returned a verdict for Criswell and against defendant Western Air Lines, Inc. ("Western") in the amount of $50,393.87. This verdict covers the 28-month period from August 1978 to November 1980. Criswell is awarded additional liquidated damages in a like amount of $50,393.87. Criswell is further awarded lost wages of $5,116.41 per month for the six-month period from verdict to judgment (December 1980 to May 1981), or $30,698.46

Recap of Damages Payable by Western to Criswell:

Actual pre-verdict damages	$ 50,393.87
Liquidated damages	50,393.87
Actual post-verdict damages	30,698.46
Total	$131,486.20

Plus interest on actual damages from accrual (pre-verdict damages accruing monthly at the rate of 1/28th of $50,393.87 per month, commencing on August 1, 1978, and post-verdict damages accruing monthly at the rate of $5,116.41 per month, commencing on December 1, 1980) to the entry of judgment, at the rate of seven percent (7%) per annum.

2. *Plaintiff Starley.* The jury returned a verdict for Starley and against Western in the amount of $52,088.94. Starley is awarded additional liquidated damages in a like amount of $52,088.94. Starley is further awarded lost wages of $5,116.41 per month for the six-month period from verdict to judgment (December 1980 to May 1981), or $30,698.46.

Recap of Damages Payable by Western to Starley:

Actual pre-verdict damages	$ 52,088.94
Liquidated damages	52,088.94
Actual post-verdict damages	30,698.46
Total	$134,876.34

Plus interest on actual damages from accrual (pre-verdict damages accruing monthly at the rate of 1/28th of $52,088.94 per month, commencing on August 1, 1978, and post-verdict damages accruing monthly at the rate of $5,116.41 per month, commencing on December 1, 1980) to the entry of judgment, at the rate of seven percent (7%) per annum.

3. *Plaintiff Ron.* The jury returned verdict for Ron and against Western in the amount of $5,000. Because Ron has continued working pursuant to a preliminary injunction, no damage adjustment is necessary. He is, however, awarded additional liquidated damages in a like amount. The total money judgment in favor of Ron is $10,000. No prejudgment interest is awarded to plaintiff Ron.

B. *Equitable Decree.*

1. Plaintiffs Criswell and Starley shall immediately be reinstated as employees by Western under the following terms and conditions:

(a) Full seniority on the pilot seniority list, as of their respective, original dates of hire as pilots.

(b) Each such plaintiff shall be awarded a position as DC-10 second officer, either as was originally bid by him or any other position as to which plaintiff would have been entitled to have his bid awarded which was opened for bidding on or after each such plaintiff's retirement.

(c) Full salary reflecting each such plaintiff's seniority and position.

(d) In-house training customarily given by Western to DC-10 pilots downbidding or downgraded to DC-10 second officers.

(e) Western shall restore to the respective pension trusts all amounts paid under the Western-ALPA Fixed and Variable Pilot Pension Plans to plaintiffs Criswell and Starley. In satisfying the money judgments in favor of said plaintiffs, however, Western may offset all amounts paid to them under the Variable Plan subsequent to November 1980.

2. Plaintiff Ron shall be continued in his employment by Western as a DC-10 second officer. He shall retain his position on the pilot seniority list.

3. With respect to all plaintiffs, Western:

(a) Shall continue to make regular, required contributions to the Pilots Variable Pension Plan for each plaintiff's account.

(b) Shall allow each plaintiff to elect whether or not to commence receipt of the benefits to which he is entitled under the Pilots Fixed Pension Plan retroactive to his sixtieth birthday or upon actual retirement. Said election shall be made within thirty (30) days hereof. If any plaintiff elects retroactive commencement of pension payments, all back payments shall be at seven percent (7%) interest from accrual to payment. If any plaintiff elects deferral to actual

retirement date, his benefits shall be actuarially adjusted to reflect the shorter life expectancy resulting from such deferred commencement.

(c) May, until the first renewal of the Pilot Agreement, require, in addition to current medical certificates required by the Federal Aviation Administration, such further medical examinations as Western deems necessary or appropriate to enable it to discharge its responsibilities as a certificated air carrier. Such examinations shall be at Western's expense.

(d) Shall not require plaintiffs to retire and shall not discriminate against any of them in the terms, conditions or privileges of their employment for any reason based on age, prior to plaintiffs' respective seventieth birthdays.

4. Western, its officers, agents, servants, employees, and attorneys and all persons in active concert or participation with it who receive actual notice of this final Judgment and Permanent Injunction and Western's successors and assigns, are hereby permanently enjoined from:

(a) Refusing or failing to permit its flight deck crew members to work or continue to work as second officers after age 60 for any reason based on age.

(b) Refusing or failing to consider or act favorably upon downbids by captains or first officers for second officer positions for any reason based on age.

(c) Continuing to enforce its policy of requiring all flight deck personnel, including second officers, to retire at age 60.

(d) Any further violation of Section 4(a) of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §623(a).

The provisions of paragraph B.3 of this Final Judgment and Permanent Injunction shall apply to this paragraph 4.

5. Western shall require that its chief executive officer and all officers who have any responsibility over flight operations and flight deck personnel be furnished with a copy of and read part B of this Final Judgment and Permanent Injunction. Within 60 days of the date hereof, Western's chief executive officer or such other officer as may be delegated by him for this purpose, shall file and serve an affidavit of compliance, certifying that the provisions of this paragraph 5 have been complied with.

6. The Court reserves jurisdiction over this action to alter, amend, modify and enforce this Final Judgment and Permanent Injunction.

(C). *Attorneys' Fees and Costs.*

Plaintiffs are awarded reasonable attorneys' fees, the amount of such award to be determined by an order after judgment, as provided in the memorandum opinion filed concurrently herewith.

Plaintiffs shall recover of defendant their costs of suit.

Dated: May 12, 1981.

/s/ A. Wallace Tashima
A. WALLACE TASHIMA
United States District Judge

Correction of Final Judgment and of Memorandum Opinion; Filed 5/13/81.

United States District Court, Central District of California.

Charles G. Criswell, Albert Ron, Rulon H. Starley, Plaintiffs, v. Western Air Lines, Inc., Defendant. No. CV 78-2184 AWT.

Filed: May 13, 1981.

The Final Judgment and Permanent Injunction, filed on May 12, 1981, and entered on May 13, 1981, is hereby corrected, as follows:

1. The amount of "$50,393.87" appearing on page 1 at line 27 and page 2 at lines, 1, 6, 6.5 and 9 is corrected to read "$60,393.87."

2. The total amount of the money judgment in favor of plaintiff Criswell on page 2 at line 7 is corrected by deleting "$131,468.20" and substituting therefor the amount of "$151,468.20."

The Memorandum Opinion, filed on May 12, 1981, is hereby corrected by deleting the first figure "5" which appears on page 2 at line 8 as a part of the amount "$50,393.87," and substituting therefor the figure "6."

Dated: May 13, 1981.

/s/ A. Wallace Tashima
A. WALLACE TASHIMA
United States District Judge

Memorandum Decision and Order Re Attorneys Fees; Filed 11/3/81.

United States District Court, Central District of California.

Charles G. Criswell, et al., Plaintiffs, v. Western Air Lines, Inc., Defendant. No. CV 78-2184 AWT.

Filed: November 3, 1981.

Pursuant to the portion of the judgment in this action awarding reasonable attorneys' fees to plaintiffs, plaintiffs and Attorney Joan Celia Lavine ("Lavine") have submitted separate applications for attorneys' fees. Plaintiffs' application covers the services of the firm of Haley, Bader & Potts and Fred T. Ragsdale, designated local counsel, pursuant to Local Rule 1.3(b)(3). The Court has now reviewed the applications, all of the material submitted in support thereof and defendant's opposition thereto.

In reaching its decision of the amount of fees to be awarded as "reasonable", the Court has also reviewed the 12 factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). *Kelly v. American Standard, Inc.*, 640 F.2d 974, 986 (9th Cir. 1981); *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975), *cert. denied sub nom., Perkins v. Screen Extras Guild, Inc.*, 425 U.S. 951 (1976).

Plaintiffs' Application.

I find that the time and labor required is accurately set forth in plaintiffs' application and supplemental application, with one exception referred to below. Although attacked by defendant in some respects, given the length and complexity of the trial and the novelty of the issues involved, the time spent in preparation for trial, from the Court's own experience, bears a reasonable relationship to the trial. The time spent during trial is not and cannot be disputed. Two attorneys actively participated in the trial for plaintiffs, as was the case for defendant.

I disallow the hours claimed in connection with arbitration of the bid dispute before the Western Air Lines Pilots System Board of Adjustment, established by the applicable labor agreement. Although plaintiffs' argument for recovery of these fees is appealing, to protect the integrity of the collective bargaining process, I conclude that if attorneys' fees are to be recoverable for arbitrations of disputes arising under a collective bargaining agreement, they must be provided for by the agreement.

The lodestar hourly rates claimed by plaintiffs are reasonable and within the range customarily charged for similar work.

The trial involved a number of novel issues with respect to which, at the time of trial, there was no guidance from case law in this Circuit. On some of these issues the authorities from other circuits were split. This apparently was the first ADEA case, involving flight engineers on commercial airlines, to go to a jury trial. Plaintiffs' counsel are highly skilled in this area, a skill which is not widely found. There was some preclusion from other employment, as is the case with any trial of four weeks or more, involving extensive discovery, other trial preparation and numerous pre and post trial appearances. Although the agreed upon fee was an hourly arrangement and some payment was made by plaintiffs to their attorneys, as a practical matter recovery of the fees was contingent on success.

Plaintiffs prevailed on virtually all substantive issues. The monetary amount of the judgment totalled $296,362.54, plus substantial prejudgment interest. A preliminary injunction was secured on behalf of plaintiff Ron, by which he was able to continue his employment and without which

damages would have been significantly increased. A permanent injunction has been issued, fully restoring plaintiffs to employment and to all rights as employees. Because of proof of willfulness in the violations of the ADEA, class-wide injunctive relief has also been granted.

Although all of the 12 factors have not been discussed above in detail, all have been considered. *Manhart v. City of Los Angeles, Dept. of Water & Power*, 652 F.2d 904, 908 (9th Cir. 1981). After a weighing of those factors, including the fact that, as a practical matter, recovery of attorneys' fees was contingent, I reject defendant's contention that any award cannot exceed the agreed upon fees. Those fees, although considered, are not decisive. *Manhart, supra*, at 909. I reject also defendant's contention that any award should be discounted because of the beneficial fallout effect the work on this case will have for the attorneys who specialize in and are handling other cases in this area. That factor is more properly weighed in any subsequent fee applications where the fallout will, presumably, have its effect.

Given all of the above factors, I find the following to be reasonable attorneys' fees:

Haley, Bader & Potts

Attorney	"Blended" Hourly Rate	Hours	Fees
Raymond C. Fay	$112.50	1,130.25	$127,153
Alan M. Serwer	85.00	681.75	57,949
William E. Hartgering	95.00	265.5	25,223
Richard M. Riehl	125.00	22.5	2,813
Susan D. Goland	95.00	11.75	1,116
Paralegals	27.50	67.0	1,843
Total Lodestar Award			$216,097

I further find with respect to the fees to be awarded on behalf of this law firm that because of the special circumstance involved, as set forth above, it is necessary to apply

a multiplier of 1.5 to the lodestar amounts of Messrs. Fay and Serwer (totalling $185,102) for an additional award of reasonable attorneys' fees of $92,551, making the total fees awarded for the work of this firm $308,648.

Fred T. Ragsdale

62.2 hours, at $75.00 per hour $4,665.00

Application of Lavine

Lavine has made her own application for attorney's fees, *in propria persona*, separate and apart from plaintiffs' application. When the Court questioned her standing to make such application because she is neither a party nor an attorney of record, she moved to strike her removal as designated local counsel by the designation in her place of Attorney Ragsdale. Both the application and motion are disposed of herein.

The motion to strike is denied both for untimeliness and on the merits. *Cf. United States v. Ford*, 650 F.2d 1141, 1144 n.1 (9th Cir. 1981) (right to attorney's fees under 42 U.S.C. §1988 to be determined on existing record without right to redetermine any issue in underlying action). Lavine was removed as designated local counsel on January 2, 1979, according to her, without her consent. The motion, if it were believed to have merit, should have been made at the time of removal, not two and one-half years later. On the merits, under Local Rule 1.3(b)(3), whether or not to require such a designation is a matter within the discretion of the trial judge. The purpose of local counsel is to serve the convenience of the Court and to assist counsel of record in matters regarding local practice. Obviously, designated local counsel must be counsel with whom the attorneys of record can work, *i.e.*, of their choice.

Moreover, granting the motion would not affect the outcome of Lavine's application. Granting a statutory reason-

able fee is not a matter of contract. The fact, if it is a fact, that she may have a contract with plaintiff Starley does not govern this application. *Manhart, supra*, 652 F.2d at 909. If that contract has been breached she may pursue her contract remedies. Under the ADEA, the test is one of reasonableness in light of the attorney's contribution to the outcome of the litigation as reflected in the record.

With respect to the application itself, despite the Court's invitation to supplement her application with the required specific data to support the amount claimed, this has not been done. There is no basis in her application to show what Lavine did, that what she did was done at the request of lead counsel (counsel of record) or was otherwise not duplicative of the work of counsel of record. Designated local counsel have a limited role, as illustrated by plaintiffs' application in support of Ragsdale's fees. For this reason and because an attorney who is not an attorney of record has no standing to apply for fees under the ADEA, separate and apart from the application of plaintiffs, the separate application of Lavine is denied.

However, on the basis of the entire record in this case, I find that the services of Lavine as designated local counsel for the first six of the 35 months this matter was pending, from filing of the Complaint to the entry of judgment, to have been of some minimal benefit to plaintiffs.

Based on the foregoing and a review of the 12 factors set forth in *Johnson, supra*, and treating the papers as a supplemental application by plaintiffs, I find that a reasonable attorney's fee for the services of Joan Celia Lavine to be $1,555.00, one-third of the fee awarded for the services of Ragsdale. This amount is further awarded to plaintiffs as additional reasonable attorneys' fees.

Costs.

None of the items of costs claimed by plaintiffs has been objected to by defendant as non-taxable or unreasonable. For this reason, the following costs claimed are awarded:

Plaintiffs' Initial Cost Bill:

Haley, Bader & Potts	$26,302.89
Fred T. Ragsdale	245.46
Plaintiffs' Supplemental Cost Bill	727.78
Total Costs	$27,276.13

If an attorney not an attorney of record or a party cannot claim attorney's fees, *a fortiori*, such a person cannot claim costs. Moreover, a review of the "costs" claimed by Lavine indicate that they are expenses of running a law office and no item claimed has been shown to be costs, in the taxable sense. For these reasons, all "costs" claimed by Lavine are denied.

RECAP

Attorneys Fees:		
Haley, Bader & Potts — lodestar	$216,097	
Additional award for $185,102, subject to multiplier of 1.5	$ 92,551	
		$308,648.
Fred T. Ragsdale		4,665.
Joan Celia Lavine		1,555.
Total Attorneys Fees awarded to plaintiffs		$314,864.00
Costs		27,276.13
Total Attorneys Fees & Costs awarded to plaintiffs		$342,140.13

Dated: Nov. 3, 1981.

/s/ A. Wallace Tashima
A. WALLACE TASHIMA
United States District Judge

Findings of Fact and Conclusions of Law, Filed April 25, 1979.

United States District Court, Central District of California.

Charles G. Criswell, Albert Ron, Rulon H. Starley, Plaintiffs, v. Western Air Lines, Inc., Defendant. CV 78-2184-MML.

Filed: April 25, 1979.

On consideration of motions for summary judgment filed by both plaintiffs and defendant, papers filed in response to those motions, and the argument of counsel, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. This action was brought under section 7 of the Age Discrimination in Employment Act of 1967 (''ADEA''), 29 USC §626, and under California Labor Code §1420.1.

2. Defendant is a Delaware corporation with its principal place of business at Los Angeles, California, and is a commercial airline carrier, certified by the Civil Aeronautics Board, and in the operation of its business carries passengers and freight by aircraft to, from and between various points within the continental United States and overseas. Defendant is an employer within the meaning of the ADEA.

3. At the time this action was brought, all three plaintiffs were employed by Western. Plaintiffs Criswell and Starley were DC-10 Captains and plaintiff Ron was a DC-10 Second Officer. The Sixtieth birthdays of plaintiffs were in June, 1978 (Ron) and July, 1978 (Criswell and Starley).

4. Pilots employed by defendant are represented by Airlines Pilots Association, International (''ALPA'') for purposes of collective bargaining in a unit consisting only of pilots. In addition to negotiating a collective bargaining

agreement with ALPA governing terms and conditions of employment of pilots ("Pilot Agreement"), defendant and ALPA have also negotiated retirement plans for the exclusive benefit of such pilots. A Fixed Retirement Benefit Plan was so established and approved and adopted by Western's Board of Directors effective July 1, 1952. Effective April 1, 1956, defendant established a Variable Benefit Retirement Plan which was also adopted and approved by defendant's Board of Directors. Both Plans have since been incorporated in the collective bargaining agreement between Western and ALPA and remained in effect at all relevant times. A pilot entitled to retirement benefits is eligible for coverage under both Plans. Both Plans have provided from their inception that the normal retirement age of pilots is the attainment of age 60.

5. The Pilot Agreement between Western and ALPA contains numerous provisions relating to a pilot's right in cases of promotion, demotion, reduction in force or termination from defendant, which are based upon a pilot's seniority with defendant. With the use of this seniority system, pilots may bid on vacant flight positions at any base at which defendant operates if he has the qualifications to do so. The Pilot Agreement provides for the constant advancement of pilots by means of the seniority system. Pilots may avoid advancement by taking advantage of several provisions of the Pilot Agreement which allow for temporary downbidding. One such provision is §10(C)4.f of the Pilot Agreement, which reads in pertinent part:

> "f. Pilots may bid on new wide body equipment vacancies without regard to the category order of Paragraph (b)1. of this Section. If the bid award is the result of a downbid the pilot may not bid on any other category vacancies which would become effective within twelve (12) months of the originally published effective

> date of the lower category bid and the pilot shall not be eligible for the bypass protection of Paragraph (G) of this Section.
>
> "i. A pilot who downbids to a Second Officer category from a Captain or First Officer category under subparagraph f. above will be required to amend his Standing Bid at the end of the twelve (12) month period to reflect his desire to reacquire a category bid in his former status."

6. Effective March 15, 1960, the Federal Aviation Administration adopted a regulation prohibiting any certified carrier from using the services of any person over the age of sixty as a pilot flying an aircraft in passenger service. 14 CFR §121.383(c).

7. In September, 1977, plaintiff Starley, a DC-10 Captain, submitted a bid for the position of DC-10 Second Officer on new aircraft equipment. This bid was initially awarded to Starley, but was cancelled by defendant in March, 1978 on the ground that the award was made in error.

8. In November, 1977, plaintiff Criswell, a DC-10 Captain, submitted a bid for the position of DC-10 Second Officer on Western Air Lines interchange equipment. The bid was rejected because it was not proper under §10(C)4.f.

9. In February, 1978, Western informed plaintiffs Ron and Starley in writing that they were required to retire at age sixty due to the mandatory age set forth in the Pilot Retirement Plans. Defendant also communicated to plaintiff Criswell that he would be required to retire at age sixty.

10. In March, 1978, plaintiffs Starley and Criswell submitted grievances with the Western Air Lines Pilots System Board of Adjustment ("Systems Board") based upon defendant's refusal to award them bids as DC-10 Second Officer.

11. In November, 1978, the System Board denied the grievances of plaintiffs Starley and Criswell after a hearing. The Systems Board determined that §10(C)4.f of the Pilot Agreement was not intended to allow a widebody DC-10 Captain to downbid to a widebody DC-10 Second Officer position. This provision of the collective bargaining agreement was interpreted only to allow temporary downbids from narrow body pilot positions to lower positions on new wide body equipment. The Systems Board also found that Criswell had not submitted a bid on new widebody equipment.

12. Plaintiffs Starley and Criswell only sought to justify their downbids under §10(C)4.f. and not under any other provision of the Pilot Agreement allowing temporary downbids. There was no evidence presented that younger DC-10 Captains were allowed to downbid to DC-10 Second Officer positions in the manner in which Starley and Criswell sought to downbid. There was evidence presented that temporary pilot downbids had been allowed under other provisions of the Pilot Agreement, and that a few pilots had been granted permanent Second Officer status in unique circumstances by special agreement.

13. Plaintiffs Starley and Criswell did not have the minimum qualifications for the Second Officer position at the time of their downbids.

14. After a hearing on June 26, 1978 on plaintiffs' motion for preliminary injunction plaintiff Ron was reinstated as a DC-10 Second Officer. Plaintiffs Starley and Criswell were required to retire at age sixty.

15. Any Finding of Fact containing a Conclusion of Law shall be deemed a Conclusion of Law.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over this action pursuant to 29 USC §626 and the doctrine of pendent jurisdiction.

2. The FAA "Age 60 Rule", 14 CFR §121.383(c), prohibits plaintiffs from working as Captains or First Officers after the age of sixty. The rule does not apply to the position of Second Officer, which is equivalent to the position of "flight engineer," as that term is used by the FAA.

3. Plaintiffs may not be retired because of the mandatory retirement age set forth in the Pilot Retirement Plans. These plans do not fall within the exception in Section 4(f)(2) of the ADEA, 29 USC §623(f)(2). As amended effective April 6, 1978, the ADEA prohibits the application of a collectively bargained employee benefit plan or seniority system to require or permit the involuntary retirement of an individual under 65 years of age. 29 USC §623(f)(2); Age Discrimination in Employment Act Amendments of 1978, P.L. 95-256, 92 Stat. 189.

4. The Western Airlines Pilots Systems Board of Adjustment has determined that it would violate the Pilot Agreement for defendant to award Criswell and Starley their downbids to Second Officer positions. The interpretation of the Pilot Agreement, which was created pursuant to the Railway Labor Act, 45 USC §151 *et seq.*, is within the exclusive jurisdiction of the Systems Board. 45 USC §184; *Elgin, Joliet & Western Railway Co. v. Burley*, 325 U.S. 711, 65 S.Ct. 1282 (1945); *United Transportation Union v. Penn Central Transportation Co.*, 505 F.2d 542 (3d Cir. 1974); *International Association of Machinists & Aerospace Workers v. Compagnie Nationale Air*, 433 F.Supp. 1087 (SDNY 1977). The Court accepts the Systems Board inter-

pretation of §10(C)4.f. as reasonable, based on the evidence, and reached in an adversary proceeding before a tribunal of special competence.

5. The substantial and determinative reason for Western's denial of the proposed downbids of Starley and Criswell was that such downbids were improper under the Pilot Agreement. *Laugeson v. Anaconda Co.*, 510 F.2d 307 (6th Cir. 1975); 29 CFR §860.103(a).

6. There was no evidence presented which showed that Western allowed younger DC-10 pilots to downbid as Starley and Criswell sought to do. All other downbids or permanent placements in lower positions were shown to be authorized by the Pilot Agreement or by special contractual agreement.

7. The retirements of Starley and Criswell were mandated solely by the application of the FAA Age 60 Rule. Western was not obligated to provide special treatment for pilots subject to the Age 60 Rule. The retirements were within the exceptions provided by 29 USC §623(f)(1).

8. As to plaintiff Ron, a prima facie case of age discrimination has been shown. *Kentroti v. Frontier Airlines, Inc.*, 585 F.2d 967 (10th Cir. 1978); *Marshall v. Roberts Dairy Co.*, 572 F.2d 1271 (8th Cir. 1978); *Cf. McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1975). His termination is not mandated by the FAA Age 60 Rule, nor is it justified because of the retirement age specified in the retirement plans. 29 USC §623(f)(2).

9. The defendant's retirement plans are bona fide retirement plans under California Labor Code §§1420.1 and 1420.15. *See also* 8 Cal.Adm. Code §§295.1(b) and 296.0. Consequently, defendant has a valid defense to the claims of all plaintiffs under California Labor Code §1420.1.

10. There remains a genuine issue of material fact as to whether age is a bona fide occupational qualification for the position of Second Officer. 29 USC §623(f)(1). An evidentiary hearing must be held regarding this issue.

11. Any Conclusion of Law containing a Finding of Fact shall be deemed a Finding of Fact.

Dated: April 24, 1979

/s/ Malcolm M. Lucas
Malcolm M. Lucas
United States District Judge

Amended Findings of Fact and Conclusions of Law, Filed September 11, 1979.

United States District Court, Central District of California.

Charles G. Criswell, Albert Ron, Rulon H. Starley, Plaintiffs, v. Western Air Lines, Inc., Defendant. No. CV-78-2184-MML.

Filed: September 11, 1979.

After careful assessment of the plaintiffs' motion for reconsideration of the Findings of Fact and Conclusions of Law filed on April 25, 1979, the Court makes the following amended Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. This action was brought under section 7 of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §626, and under California Labor Code §1420.1.

2. Defendant is a Delaware corporation with its principal place of business at Los Angeles, California, and is a commercial airline carrier, certified by the Civil Aeronautics Board, and in the operation of its business carries passengers and freight by aircraft to, from and between various points within the continental United States and overseas. Defendant is an employer within the meaning of the ADEA.

3. The cockpit of a Western aircraft is manned by a Captain, a First Officer, and a Second Officer. At the time this action was brought, all three plaintiffs were employed by Western. Plaintiffs Criswell and Starley were DC-10 Captains and plaintiff Ron was a DC-10 Second Officer. The sixtieth birthdays of plaintiffs were in June, 1978 (Ron) and July, 1978 (Criswell and Starley).

4. Pilots employed by defendant are represented by Airlines Pilots Association, International ("ALPA") for purposes of collective bargaining in a unit consisting only of

pilots. In addition to negotiating a collective bargaining agreement with ALPA governing terms and conditions of employment of pilots ("Pilot Agreement"), defendant and ALPA have also negotiated retirement plans for the exclusive benefit of such pilots. A Fixed Retirement Benefit Plan was so established and approved and adopted by Western's Board of Directors effective July 1, 1952. Effective April 1, 1956, defendant established a Variable Benefit Retirement Plan which was also adopted and approved by defendant's Board of Directors. Both Plans have since been incorporated in the collective bargaining agreement between Western and ALPA and remained in effect at all relevant times. A pilot entitled to retirement benefits is eligible for coverage under both Plans. Both Plans have provided from their inception that the normal retirement age of pilots is the attainment of age 60.

5. The Pilot Agreement between Western and ALPA contains numerous provisions relating to a pilot's rights in cases of promotion, demotion, reduction in force or termination from defendant. These rights are based on a pilot's seniority with defendant. Generally, Captains are senior to First Officers which in turn are senior to Second Officers. Under certain provisions of the Pilot Agreement, pilots may downbid or be downgraded to less senior positions. One such provision is §10(C)4.f. of the Pilot Agreement, which allows for temporary downbids on new wide body equipment. It provides in pertinent part:

> "f. Pilots may bid on new wide body equipment vacancies without regard to the category order of Paragraph (b)1. of this Section. If the bid award is the result of a downbid the pilot may not bid on any other category vacancies which would become effective within twelve (12) months of the originally published effective date of the lower category bid and the pilot shall not

be eligible for the bypass protection of Paragraph (G) of this Section.

"i. A pilot who downbids to a Second Officer category from a Captain or First Officer category under subparagraph f. above will be required to amend his Standing Bid at the end of the twelve (12) month period to reflect his desire to reacquire a category bid in his former status."

6. The term "downbid" is used in the Pilot Agreement to designate the procedure used to move from a higher job category to a lower job category at the behest of the pilot making the change. The term "downgrade" is not used in the Pilot Agreement, but it is used in this litigation to describe all instances of moving from a higher job category to a lower job category. Except where the term "downbid" is specifically appropriate, the term "downgrade" shall be used to designate changes from higher job categories to lower job categories.

7. Effective March 15, 1960, the Federal Aviation Administration adopted a regulation prohibiting any certified carrier from using the services of any person over the age of sixty as a pilot flying an aircraft in passenger service. 14 CFR §121.383(c).

8. In September, 1977, plaintiff Starley, a DC-10 Captain, submitted a bid for the position of DC-10 Second Officer on new aircraft equipment. This bid was initially awarded to Starley, but was cancelled by defendant in March, 1978 on the ground that the award was made in error.

9. In November, 1977, plaintiff Criswell, a DC-10 Captain, submitted a bid for the position of DC-10 Second Officer on Western Air Lines interchange equipment. The bid was rejected because it was not proper under §10(C)4.f.

10. In February, 1978, Western informed plaintiffs Ron and Starley in writing that they were required to retire at

age sixty due to the mandatory age set forth in the Pilot Retirement Plans. Defendant also communicated to plaintiff Criswell that he would be required to retire at age sixty.

11. In March, 1978, plaintiffs Starley and Criswell submitted grievances with the Western Air Lines Pilots System Board of Adjustment ("System Board") based upon defendant's refusal to award them bids as DC-10 Second Officers.

12. In November, 1978, the System Board denied the grievances of plaintiffs Starley and Criswell after a hearing. The System Board determined that §10(C)4.f. of the Pilot Agreement was not intended to allow a wide body DC-10 Captain to downbid to a wide body DC-10 Second Officer position. This provision of the collective bargaining agreement was interpreted only to allow temporary downbids from narrow body pilot positions to lower positions on new wide body equipment. The System Board also found that Criswell had not submitted a bid on new wide body equipment.

13. Plaintiffs Starley and Criswell only sought to justify their bids for Second Officer positions under the downbidding procedure designated in §10(c)4.f. of the Pilot Agreement, and not under any other provision of the Pilot Agreement.

14. Plaintiffs Starley and Criswell had certain of the qualifications necessary for the Second Officer positions. The qualifications they did not have for the positions could have been acquired in training programs offered by Western.

15. It is the contention of defendant that the bids of Starley and Criswell were denied because the bids were not proper under the terms of §10(C)4.f. of the Pilot Agreement. Defendant also contends that all pilots are required to upgrade whenever possible under the Pilot Agreement; that

bids are granted or denied without respect to age; and that there are few instances of downgrading allowed by the defendant under the Pilot Agreement. Defendant also contends that age is a bona fide occupational qualification for the position of Second Officer, and has presented evidence raising a genuine issue of material fact on this issue.

16. It is the contention of plaintiffs Starley and Criswell that their bids were denied because of their age; that Western does not provide for the constant advancement to pilot personnel; and that younger pilots have been allowed to downbid and to remain in lower job classifications without having to upgrade.

17. At the time of the motions for summary judgment, the parties had not completed discovery in this case. Subsequent to the Court's decision on the cross-motions for summary judgment, plaintiffs acquired from defendant evidence of sixty-eight instances of downgrading of Western pilot personnel from Captain or First Officer positions to Second Officer positions. Of the sixty-eight instances of downgrading, it does not appear that there is a single instance of a wide body Captain or First Officer making a downbid under §10(C)4.f. to a wide body Second Officer position. There are numerous instances of narrow body Captains or First Officers downbidding to wide body Second Officer positions. There are also numerous instances of displacement of pilots from Captain or First Officer positions to Second Officer positions. "Displacement" refers to a downgrading procedure initiated by the airline and is authorized under the Pilot Agreement. There are also several instances of pilots downgrading because of medical reasons, and several cases of pilots who have been retained in Second Officer positions because they did not meet proficiency tests for higher positions. The existence and circumstances of certain of these cases of downgrading are the subject of

dispute between the parties. These instances of downgrading are relevant to Western's defense that the downbids were denied because of the neutral application of the Pilot Agreement. The Court therefore finds that there are genuine issues of material fact raised by these sixty-eight instances of downgrading. That there may be yet undiscovered instances of downgrading further supports the Court's finding.

18. After a hearing on June 26, 1978 on plaintiffs' motion for preliminary injunction, plaintiff Ron was reinstated as a DC-10 Second Officer. Plaintiffs Starley and Criswell were required to retire at age sixty.

19. Any Finding of Fact containing a Conclusion of Law shall be deemed a Conclusion of Law.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over this action pursuant to 29 U.S.C. §626 and the doctrine of pendent jurisdiction.

2. Plaintiffs Starley and Criswell have established a prima facie case of age discrimination by showing that they are within the class protected by the ADEA; that they were retired against their will and that their downbids were denied; that they were qualified for the positions they held and for which they applied; and that younger pilots replaced them and were hired for the positions for which they submitted bids. *Kentroti v. Frontier Airlines, Inc.*, 585 F.2d 967 (10th Cir. 1974); *Marshall v. Roberts Dairy Co.*, 575 F.2d 1271 (8th Cir. 1978); *Cf. McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1975).

3. The FAA "Age 60 Rule", 14 CFR §121.383(c), prohibits plaintiffs from working as Captains or First Officers after the age of sixty. The rule does not apply to the position of Second Officer, which is equivalent to the position of "flight engineer," as that term is used by the FAA.

4. Plaintiffs may not be retired because of the mandatory retirement age set forth in the Pilot Retirement Plans. These plans do not fall within the exception in Section 4(f)(2) of the ADEA, 29 U.S.C. §623(f)(2). As amended effective April 6, 1978, the ADEA prohibits the application of a collectively bargained employee benefit plan or seniority system to require or permit the involuntary retirement of an individual under 65 years of age. 29 U.S.C. §623(f)(2); Age Discrimination in Employment Act Amendments of 1978, P.L. 95-256, 92 Stat. 189.

5. The retirements of Starley and Criswell from their positions as DC-10 Captains were mandated solely by the application of the FAA Age 60 Rule. Western was not obligated to provide special treatment for pilots subject to the Age 60 Rule. The retirements were within the exceptions provided by 29 U.S.C. §623(f)(1).

6. The Western Airlines Pilots Systems Board of Adjustment has determined that it would violate the Pilot Agreement for defendant to award Criswell and Starley their downbids to Second Officer positions. The interpretation of the Pilot Agreement, which was created pursuant to the Railway Labor Act, 45 U.S.C. §151 *et seq.*, is within the exclusive jurisdiction of the System Board. 45 U.S.C. §184; *Elgin, Joliet & Western Railway Co. v. Burley*, 325 U.S. 711, 65 S.Ct. 1282 (1945); *United Transportation Union v. Penn Central Transportation Co.*, 505 F.2d 542 (3d Cir. 1974); *International Association of Machinists & Aerospace Workers v. Campagnie Nationale Air*, 433 F.Supp. 1087 (SDNY 1977). The Court accepts the System Board interpretation of §10(C)4.f. as reasonable and related to the terms of the collective bargaining agreement; based on the evidence presented to the System Board; and reached in an adversary proceeding before a tribunal of special competence.

7. The defendant has shown that a reasonable factor other than age for the denial of the downbids was that the downbids were improper under the Pilot Agreement. The Court holds that this factor was a substantial factor in the denial of the downbids. 29 U.S.C. §623(f)(1).

8. Whether age was a substantial and determinative factor in the denial of the downbids remains a matter for litigation because of genuine issues of material fact concerning the application and impact of the Pilot Agreement.

9. As to plaintiff Ron, a prima facie case of age discrimination has been shown. His termination is not mandated by the FAA Age 60 Rule, nor is it justified because of the retirement age specified in the retirement plans. 29 U.S.C. §623(f)(2).

10. The defendant's retirement plans are bona fide retirement plans under California Labor Code §§1420.1 and 1420.15. *See also* 8 Cal.Adm. Code §§295.1(B) and 296.0. Consequently, defendant has a valid defense to the claims of all plaintiffs under California Labor Code §1420.1.

11. There remains a genuine issue of material fact as to whether age is a bona fide occupational qualification for the position of Second Officer. 29 U.S.C. §623(f)(1). An evidentiary hearing must be held regarding this issue.

12. Any Conclusion of Law containing a Finding of Fact shall be deemed a Finding of Fact.

Dated: August 30, 1979

/s/ Malcolm M. Lucas
Malcolm M. Lucas
United States District Judge

Order, Filed September 11, 1979.

United States District Court, Central District of California.

Charles G. Criswell, Albert Ron, Rulon H. Starley, Plaintiffs, v. Western Air Lines, Inc., Defendant. No. CV-78-2184-MML.

Filed: September 11, 1979.

In light of the Amended Findings of Fact and Conclusions of Law, the Court withdraws the Findings of Fact and Conclusions of Law filed on April 25, 1979. The plaintiffs' motion for reconsideration is granted in part and the summary judgment previously granted against Starley and Criswell is withdrawn. The Court also orders the plaintiffs' motion for sanctions taken off calendar. Plaintiffs may reschedule that motion upon proper notice and upon a factual showing that defendant did not reasonably comply with discovery requests. The Pretrial Conference, now scheduled for October 1, 1979, shall be rescheduled for December 3, 1979 at 10:00 A.M.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk shall serve, by United States mail, copies of this Order on counsel for the parties in this matter.

Dated: September ___, 1979

/s/ Malcolm M. Lucas
Malcolm M. Lucas
United States District Judge

Order of the Ninth Circuit; Filed 12/20/83.

United States Court of Appeals for the Ninth Circuit.

Charles G. Criswell, et al., Plaintiffs-Appellees, v. Western Air Lines, Inc., Defendant-Appellant. Nos. 81-5536, 81-5619, 81-6013, 81-6023. DC No. 78-2184 CD Cal.

Westcot B. Stone, III, et al., Plaintiffs-Appellees, v. Western Air Lines, Inc., Defendant-Appellant. No. 82-5082. DC No. 81-5521 CD Cal.

Filed: December 20, 1983.

Before: KENNEDY, TANG and FERGUSON, Circuit Judges.

The panel as constituted in the above cases has voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

System Board Decision; Dated November 1978.

Western Airlines, Inc. Pilots System Board of Adjustment.

In the Matter of the Arbitration Between, Western Airlines, Inc., Los Angeles, California, and The Airline Pilots in the service of Western Airlines, Inc., as represented by the Air Line Pilots Association, Intn'l. WAL-2-78, C. G. Criswell, WAL-5-78, R. H. Starley.

Apperances: Raymond C. Fay, Esq., (Haley, Bader and Po[illegible], Esqs.,) of Chicago, Illinois, Attorney for the Grievants; Kenneth B. Cooper, Esq., Attorney for Air Line Pilots Association, International, Los Angeles, California; Everett Barber, Esq., Attorney for the Company.

OPINION OF NEUTRAL CHAIRMAN

Two related grievances were asserted by two separate pilots in March 1978 contending that the Company had failed to grant their requested downbids in claimed violation of portions of Section 10 and 12 of the Agreement. The question at issue in Case WAL-2-78 reads as follows:

> "Whether the Company violated Section 10(C) 4.f. of the Agreement by failing to award Captain Charles G. Criswell a DC-10 Second Officer bid on bid call 77-19 which closed December 13, 1977? If so, what should be the appropriate remedy?"

The question at issue in Case WAL-5-78 reads as follows:

> "Whether the Company violated Sections 10, 12 and other related Sections of the Agreement by cancelling Captain R. H. Starley's DC-10 Second Officer bid and by failing to provide Captain R. H. Starley with the training necessary to fill such DC-10 Second Officer vacancy as of the effective date of the bid? If so, what should be the appropriate remedy?"

Both grievants have been DC-10 Captains based in Honolulu, and both grievants were approaching their 60th birthday during 1978. On September 1, 1977 the Company posted new equipment bids for DC-10 aircraft scheduled to be flown between Honolulu and the Company's mainland cities. Captain Starley during the Fall of 1977 filed his standing bid seeking to be awarded a DC-10 Second Officer vacancy in Honolulu effective on or after June 1, 1978. The bid was awarded on October 7, 1977 by a Company supervisor based upon his reading of the currently effective Agreement coupled with previously negotiated wide body downbid Letters of Agreement commencing in 1971. Captain Starley's award to a DC-10 Second Officer remained in place from its approval on October 7, 1977 to March 6, 1978, when the Company cancelled his bid upon the ground that he would reach his normal and mandatory retirement date (Sections 5.1 and 5.3 of the negotiated Pilot Retirement Income Plan) within a short period after the effective date of the bid, and that the bid had therefore been granted in error. It is this Company cancellation which Captain Starley grieves in this proceeding, primarily alleging a Company violated [sic] of Section 10(C) 4.f. of the Agreement.

Captain Criswell, also a DC-10 Captain based in Honolulu and nearing age 60, bid for a DC-10 Second Officer vacancy in response to a Company posting on November 29, 1977 to fill vacancies resulting from an interchange agreement with Continental Airlines. The aircraft at all times under the interchange agreement was intended to be a Continental DC-10 which arrived in Denver with a Continental crew, which was there replaced by a Western crew to fly the aircraft between Denver and Calgary. The Company denied this attempted downbid upon the ground that the interchange agreement merely generated "added time" which was deemed unavailable for downbidding as opposed to "new equipment" which was considered to be available for downbidding. It is this Company denial which Captain

Criswell grieves in this proceeding, again as in the case of Captain Starley relying upon a claimed Company violation of Section 10(C) 4.f. in addition to the further issue of the precise status of a Continental DC-10 as Western equipment for the Denver-Calgary trip.

ALPA counsel and the grievants' private counsel, although ably arguing numerous subsidiary points, have concentrated upon Section 10(C)4.f. which provides:

> "f. Pilots may bid on new wide body equipment vacancies without regard to the category order of Paragraph (B)1. of this Section. If the bid award is the result of a downbid the pilot may not bid on any other category vacancies which would become effective within twelve (12) months of the originally published effective date of the lower category bid and the pilot shall not be eligible for the bypass protection of Paragraph (G) of this Section.
>
> i. A pilot who downbids to a Second Officer category from a Captain or First Officer category under subparagraph f. above will be required to amend his standing bid at the end of the twelve (12) month period to reflect his desire to reacquire a category bid in his former status."

This provision explicitly authorizes downbidding on new wide body equipment vacancies without regard to the agreed category order, and in subparagraph i. even refers to the permitted contingency of a downbid by a Captain to Second Officer. Counsel for the grievants and for ALPA have consequently argued effectively that the language of the applicable contract is clear, that there are no ambiguities which require any interpretations for purposes of the present case, and that the System Board of Adjustment possesses no alternative except to follow the specific mandate of the contract upon its face.

The Chairman has carefully considered the able briefs submitted by all counsel in the light of the evidence, and finds that both grievances are lacking in contractual merit despite the enthusiasm of grievants' counsel for the enforcement of the clear language of the Agreement. It is agreed by all parties that there is an absence of any substantial negotiating history or of the substance of conversation or proposals which occurred during such history. The evidence is that the Company in 1971 was contemplating its initial acquisition of wide body equipment, and it was in this light that the need was cited during negotiations for a method to permit senior pilots on the Company's regular fleet an opportunity to move to such new equipment when acquired, which would otherwise be precluded by the then existing contract. There is neither record nor recollection of any extensive discussion of differences. The sparse testimony is that an ALPA representative probably mentioned the matter at the 1971 bargaining table, that the Company agreed without discussion, that somebody produced the text of a recent agreement on the same subject between United Airlines and ALPA, and that the United Airlines agreement was embodied without debate or alteration into a 1971 Letter of Agreement executed by both parties. During the 1973 negotiations the parties acknowledged the Company's acquisition of DC-10 equipment by making the Letter of Agreement applicable to such aircraft. The parties also amended that portion of the 1971 Letter of Agreement which referred to wide body aircraft "procured" by the Company to read in the 1973 Letter of Agreement wide body aircraft "delivered to" the Company, although there is again no evidence of any particular intent in effectuating the change. The downbid Letter of Agreement continued without alteration in the 1975 contract negotiations and in 1977 emerged in the body of the contract as Section 10(C)4.f., although

it is agreed that there was no change in the intention of the parties in so doing.

It is scarcely necessary that there be volumes of minute testimony in order to establish the intention of the parties in adopting the 1971 downbid Letter of Agreement which ultimately became Section 10(C)4.f. in 1977. By 1971 the parties had evolved a mature contract which, in what is now Section 10(B), tended to freeze pilots into a specified category order while the Company operated a narrow body fleet of aircraft. The prospective acquisition in 1971 of wide body aircraft required agreement upon a method for senior narrow body pilots to reach the anticipated wide body aircraft with their greater responsibilities and rewards. The downbidding initially permitted in 1971 and continued to the present in Section 10(C)4.f. intended no more and no less than this precise result, and Section 10(C)4.f. was never intended to permit the downbidding within the same aircraft now urged by the grievants when it is so self-evident that its sole purpose was to permit narrow body pilots a downbidding prerogative to reach wide body aircraft.

There is abstract merit in the grievants' contention that an agreement which is unambiguous must be given effect by the System Board as drafted. But no provision of a contract exists in isolation independent of the meaning and purpose of the entire document. The parties have made their intention unmistakably clear in their contract that they are opposed to the principle of downbidding, for significant reasons of policy which need not be detailed here, and that downbidding is permitted only in rare and carefully defined circumstances. The only purpose of the downbidding permitted in Section 10(C)4.f. is the temporary purpose of enabling a senior narrow body pilot to move to a wide body aircraft, and then resume the normal and permanent process of upgrading in the wide body aircraft, as is evidence by i.

below Section 10(C)4.f. The grievants seek to downbid not for such an authorized purpose, but instead to reach a result by downbidding in the same aircraft which is so remote and contrary to the intention of the parties that it cannot in good conscience be effectuated. Their position amounts to a distortion of the contract not explicitly prohibited, only because the necessity of such a bizarre prohibition would never have occurred to either party. Such a position requires a holding that neither Section 10(C)4.f. nor any other cited provision of the contract permits a downbid by a Captain already in wide body equipment to a Second Officer vacancy in the same equipment when faced with an imminent mandatory retirement and for the obvious purpose of evading the application of such agreed mandatory retirement plan.

Thus far this opinion disposes of the major issue raised in both cases, but it does not deal with the separate issue raised in the Criswell case concerning the effect of the interchange agreement between Denver and Calgary. Counsel have ably sought to analyze whether the Continental DC-10 interchanged at Denver is a wide body aircraft "procured" by Western within the meaning of the 1971 Letter of Agreement or "delivered to the Company" within the meaning of the 1973 Letter of Agreement. It is of no consequence whether Western procures or takes delivery of a Continental DC-10 at Denver, nor is it of consequence whether Continental Airlines purchases, leases, or otherwise acquires possession of its wide body aircraft. What is of consequence is that Section 10(C)4.f. of the applicable 1977 contract authorizes pilots to bid on "new wide body equipment vacancies" without regard to the Section 10(B)1. category order, and that the Continental DC-10 interchanged at Denver is not and never was intended to constitute "new" Western Airlines equipment.

For the foregoing reasons the award necessarily denies both grievances by answering the submitted issues in the negative.

AWARD: ALPA CASE NO. WAL-2-78 (C. G. Criswell)

"The Company did not violate Section 10(C)4.f. of the Agreement by failing to award Captain Charles G. Criswell a DC-10 Second Officer bid on bid call 77-19 which closed December 13, 1977."

Dated: November 1978

/s/ Gerald A. Barrett
Gerald A. Barrett, Neutral

/s/ Robert V. Johnson,
Robert V. Johnson, Company
Concur

/s/ William E. Newell
William E. Newell, Company
Concur

/s/ Robert H. Ross
Robert H. Ross, ALPA
Concur

/s/ C. David Bell
C. David Bell, ALPA
Concur

AWARD: ALPA CASE NO. WAL-5-78 (R. H. Starley)

"The Company did not violate Sections 10, 12 and other related Sections of the Agreement by cancelling Captain R. H. Starley's DC-10 Second Officer bid and by failing to provide Captain R. H. Starley with the

training necessary to fill such DC-10 Second Officer vacancy as of the effective date of the bid."

Dated: November 1978

/s/ Gerald A. Barrett
Gerald A. Barrett, Neutral

/s/ Robert V. Johnson,
Robert V. Johnson, Company
Concur

/s/ William E. Newell
William E. Newell, Company
Concur

/s/ Robert H. Ross
Robert H. Ross, ALPA
Concur

/s/ C. David Bell
C. David Bell, ALPA
Dissent

DISSENTING OPINION
Re: ALPA Case No. WAL-5-78
(R. H. Starley)

The Board majority has determined that the Company was authorized to cancel the DC-10 Second Officer vacancy awarded to Captain R. H. Starley as a result of his attempt to downbid in accordance with the provisions of Section 10(C)4.f. of the Agreement. I dissent.

In grievances alleging contractual violation, the function of this Board, as set forth in paragraph (E) of the System Board of Adjustment Agreement, is to interpret and apply the disputed provisions of the Agreement in a manner so as to effectuate the parties' intent. It is a universally accepted rule of contract interpretation that the first step in determining the parties' intent is to examine the express language of the Agreement. If it is clear and unambiguous, then absent compelling reasons to the contrary, it should be given effect. While the majority opinion found and concluded that the language of Section 10(C)4.c. is clear and unambiguous and does authorize the downbid sought by Captain Starley, nevertheless the majority found only "abstract merit" in the grievant's claim that the contract should be applied as written. After paying mere lip service to the unquestioned clarity of Section 10(C)4.f., the majority divines the parties' intentions from the category order of Section 10(B) and some very loose testimony regarding negotiating history. Apparently, the majority has concluded that Section 10(C)4.f. is an exception to the rigid category order of Section 10(B). What the Board fails to note, however, is that Section 10(B) is itself an exception to the Agreement's very broad general seniority provision found in Section 9(A)3.:

> Seniority shall govern all pilots in case of promotion and demotion, their retention in case of reduction in force, their assignment or reassignment due to expansion or reduction in schedules, their reemployment after release due to reduction in force, *and their choice of vacancies*. . . .

The general rule then is freedom of choice in bidding permanent vacancies. The exception found in Section 10(C)3.c. requires pilots to advance to higher category vacancies within certain time periods. The provision at issue here, Section 10(C)4.f., is consonant with the general rule, and thus constitutes an exception to the exception. It should be given broad effect because it honors that most critical benefit secured by the Agreement — a pilot's seniority.

Mandatory category advancement can serve but one purpose: To establish a means for determining a pilot's competence. Certainly there is no benefit to the Company in added costs occasioned by training pursuant to Section 10(C)3.c. where its staffing needs are adequately met through voluntary upgrades. In the instant case, there is no issue regarding the grievant's competence. Yet the provisions of Section 10(C)3.c. are read by the majority without consideration of its patent intent and in "isolation independent of the meaning and purpose of the entire document."

While the majority opinion concludes that sustaining the grievance would achieve a "bizarre" result, in my opinion denying the grievance constitutes a flagrant rejection of Captain Starley's basic seniority right to his choice of vacancies in accordance with Section 9(A)3. Seniority is more than just a section in the Agreement. It permeates every other section of the contract and the daily lives of the pilots, affecting their relationship to each other and the Company. Were it not for mandated category advancement, the grievant could have been awarded the bid he sought. Yet the majority decision denies him such without strict adherence to the language of the downbid provision, relying instead

upon the majority's formulation of the parties' intent. It appears to me, however, that the Board majority has determined its desired ruling and then shuffled about concocting arguments to justify that predetermined result. To my mind, that constitutes a perversion of the Board's jurisdictional authority.

I would grant the grievance.

/s/ C. David Bell
C. David Bell, Member

Memorandum Decision and Order.

United States District Court, Central District of California.

Westcot B. Stone, III, et al., Plaintiffs, v. Western Air Lines, Inc., Defendant.

Western Air Lines, Inc., Third Party Complainant v. Air Line Pilots Association, International, etc., et al., Third Party Defendants. No. CV 81-5521 AWT.

Filed Dec. 17, 1981.

This is an action by a captain, seven former captains and a second officer of defendant Western Air Lines, Inc. ("Western") for alleged discriminatory employment practices prohibited by Section 4(a) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §623(a). All plaintiffs have moved for preliminary injunctions.

The practice attacked is that held unlawful by this Court in *Criswell v. Western Air Lines, Inc.*, 514 F. Supp. 384 (C.D. Cal. 1981). Because of the collateral estoppel effect to which the *Criswell* judgment is entitled, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 332 (1979); *St. Paul Fire & Marine Ins. Co. v. Weiner*, 606 F.2d 864, 868 (9th Cir. 1979), I find that plaintiffs are likely to prevail on the issue of whether or not Western's refusal to consider the downbids of captains nearing age 60 for second officer positions is violative of the ADEA. *Criswell, supra*, 514 F. Supp. at 387-93. The fact that *Criswell* is on appeal and that this Court has stayed the systemwide relief provision of the permanent injunction in that case does not deprive that judgment of its collateral estoppel effect. *See generally*, 1B Moore, Fed. Practice ¶0.416[3].

However, *Criswell* also noted, although the issue was not there presented for decision, that

> "Western was not obligated to offer them [captains] new positions where none existed upon their attaining

> age 60. Thus, the gist of their ADEA claim is that Western refused to award them second officer bids when such positions were available prior to their reaching age 60 and to which they were entitled by virtue of their positions on the pilot seniority list."

Criswell, supra, 514 F. Supp. at 391 n.13. In this case, although seven of the eight captain-plaintiffs bid for second officer positions, all but one of the bids were "standing bids," as opposed to bids on posted, existing vacancies. Therefore, the collateral estoppel effect given to the *Criswell* judgment does not establish the case of these "standing bid" plaintiffs or the non-bidding plaintiffs on this motion with respect to the factors which distinguish their claims from the claims of captains who actually bid on existing vacancies for second officer positions.

I find from a review of the evidence that none of the six standing bids for second officer positions was entitled to a second officer vacancy award under the neutral application of Western's seniority system, *i.e.*, assuming pilots are entitled to downbid to second officer positions and are entitled to continue to be employed as second officers after age 60. All of the standing bids were ineffective for one or more of the following reasons: (1) The bid was not to be effective until the pilot's sixtieth birthday (Pelton and Higgs) and there was no vacancy coinciding with the sixtieth birthday; (2) No vacancy was posted and was to become effective between the date the bid was made and the pilot's sixtieth birthday (Stone and McLaren); (3) The only available vacancy was for a different domicile (Primary Vancancy #80-14 was posted during the time Stone's bid was effective; however, there is no evidence that Stone's bid was for a Seattle domicile, putting aside the effective date issue); (4) The only available vacancies were awarded under specific provisions of the Pilot Agreement, which overrode the general seniority rule, *i.e.*, (i) Primary Vacancy #81-5 was awarded under Section 10(E)4 (to displaced pilots) and (ii) Primary Vacancy #81-9 was awarded under Section 10(E)1.e, which allows certain bidders to "follow the transferred equipment" (Dean, McLaren and Wiegand); and (5) Where a subsequent successful bid renders a prior lower category bid inoperative (Higgs). Thus, setting aside the effect of any age-60-maximum for second officers, I find that no second officer vacancies were available for the standing bid captain-plaintiffs to which they could have transferred prior to their respective sixtieth birthdays. Western's actions are, thus, not unlawful under 29 U.S.C. §623(f)(2), because the lack of vacancies was due to its observance of "the terms of a bona fide seniority system," as set forth in the Pilot Agreement, absent any consideration of age.

Although Captain Butler bid on a specific vacancy (#81-16), that vacancy was also awarded under Section 10(E)1.e to a bidder following the transferred equipment. Thus, the same considerations which apply to standing bid plaintiffs apply to plaintiff Butler as well.

Captain Cavett did not submit even a standing bid. Nothing in the record now before the Court indicates that any second officer positions were open to him under the Pilot Agreement or, if they were, that Captain Cavett sought them. Plaintiff Cavett contends that, in view of Western's clear policy of retiring second officers at age 60, he should not be required to bid on a second officer position, because it would be a futile act. The issue, however, is not whether such a bid would have been futile, but whether any second officer vacancies existed.

There is a complete absence of any showing by five of these eight plaintiffs (Cavett, Pelton, Higgs, Stone and McLaren) of one of the basic elements of their *prima facie* case, *i.e.*, the existence of a vacancy in the job sought.

Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)); *Nanty v. Barrows Co.*, No. 80-5106, slip op. at 5537 (9th Cir. Nov. 9, 1981); *Miller v. Williams*, 590 F.2d 317, 320 (9th Cir. 1979). With respect to the remaining captain-plaintiffs (Dean, McLaren, Wiegand, Higgs and Butler [there are overlapping reasons]), the neutral and non-age-related application of the seniority and bid award provisions (Section 10) of the Pilot Agreement justify the award of the vacancies to others. It is a legitimate nondiscriminatory reason for rejection of these bids. *Nanty, supra*, at 5539. Thus, for purposes of this motion, defendant has adequately rebutted the *prima facie* showing. In this posture, I find that all captain-plaintiffs have failed to meet even the most liberal end of the spectral test on the likelihood of prevailing, *i.e.*, they have not established that they have raised a serious question to be litigated — that they have a fair chance of success on the merits. *Benda v. Grand Lodge, IAM*, 584 F.2d 308, 314-15 (9th Cir. 1978), *cert. dismissed*, 441 U.S. 937 (1979).

On the other hand, plaintiff White, who was a second officer at the time this action was commenced, has met the requirements for issuance of a preliminary injunction. *Id.* By virtue of the collateral estoppel effect of the *Criswell* judgment, he has demonstrated that he will probably succeed on the merits. Discharge from employment in violation of a federally protected right to nondiscrimination in employment is, itself, adequate to establish irreparable harm. *Smallwood v. National Can Co.*, 583 F.2d 419, 420 (9th Cir. 1978); *Manhart v. City of Los Angeles, Dept. of Water & Power*, 387 F. Supp. 980, 984 (C.D. Cal. 1975) (Pregerson, J.), *aff'd*, 553 F.2d 581 (9th Cir. 1976), *modified, vacated & remanded*, 435 U.S. 702, *aff'd on remand*, 577 F.2d 98 (1978). Therefore, a preliminary injunction will issue in his

favor. Although cast in mandatory terms, the preliminary injunction issued in his favor is not a mandatory one, in that it will not alter the *status quo ante litem*, since he was discharged after commencement of this action. However, even if it is construed to be mandatory, because plaintiff White was discharged after the *Criswell* judgment became final and because the violation of a federally protected right is clear, the issuance of a mandatory preliminary injunction in his favor would meet the stringent requirements for a mandatory preliminary injunction in that "the facts and the law clearly favor the moving party." *Anderson v. United States* 612 F.2d 1112, 1114 (9th Cir. 1979).

Western, as third-party plaintiff, has made a "Motion for Declaratory and Injunctive Relief" against third-party defendants, Air Line Pilots Association, International and others (collectively "ALPA"). What Western seeks is, essentially, an interpretation by the Court of the collective bargaining agreement between it and ALPA or a declaration that any act it is compelled to take under any preliminary injunction would not violate the terms of the collective bargaining agreement. This Court has previously held, in a virtually identical context, that ALPA was not an indispensable party under Rule 19, Fed. R. Civ. P. *Criswell, supra*, 514 F. Supp. at 396. *See Eldredge v. Carpenters 46, Etc.*, No. 79-4482, slip op. 5752 (9th Cir. Nov. 4, 1981).

Western's motion is denied at this stage as premature and as amounting to a request for an advisory opinion. The Court does not have before it the complete terms of the collective bargaining agreement and ALPA has not taken the position that reinstatement of plaintiff White by Western under a preliminary injunction would cause Western to violate the terms of the collective bargaining agreement. In this circumstance, nothing respecting ALPA prevents the issuance of the preliminary injunction. *See United States v. Sheet*

Metal Workers Local 36, 416 F.2d 123, 132 & n.16 (8th Cir. 1969) (union enjoined from discriminatory practice required by collective bargaining agreement with non-party employers). Resolution of the legal dispute, if any, between Western and ALPA is better left to another day, after the record has been developed. Western has made no showing of irreparable harm justifying the issuance of preliminary injunctive relief against ALPA, particularly in light of the fact that a preliminary injunction will issue only in favor of plaintiff White.

This Memorandum Decision is intended to serve as the Court's findings of fact and conclusions of law, pursuant to Rule 52(a), Fed. R. Civ. P.

IT IS ORDERED that (1) plaintiffs' motion for preliminary injunction is granted with respect to plaintiff White and is denied with respect to remaining plaintiffs; and (2) Western's motion for declaratory and injunctive relief *pendente lite* against third-party defendants is also denied.

Dated: Dec. 17, 1981.

s/s A. Wallace Tashima,
A. WALLACE TASHIMA,
United States District Judge.

Memorandum Opinion and Order.

Westcot B. Stone, III, et al., Plaintiffs, v. Western Air Lines, Inc., Defendant.

Western Air Lines, Inc., Third Party Complainant, v. Air Line Pilots Association, International, etc., et al., Third Party Defendants. No. CV 81-5521 AWT.

United States District Court, C.D. California.

July 8, 1982.

TASHIMA, District Judge.

On December 17, 1981, the Court denied the motion of plaintiffs[1] for a preliminary injunction against defendant Western Air Lines, Inc. ("Western"). Plaintiffs now seek reconsideration of the Memorandum Decision and Order of December 17 (the "Memorandum Decision"); and renew their request for injunctive relief *pendente lite*. Western opposes plaintiffs' motion and moves for summary judgment.

This case, like *Criswell v. Western Air Lines, Inc.*, 514 F.Supp. 384 (C.D.Cal.1981), challenges allegedly discriminatory employment practices prohibited by § 4(a) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(a). Although plaintiffs have characterized the two cases as identical, plaintiffs here are in somewhat different position than the plaintiffs in *Criswell*. Whereas in *Criswell*, the plaintiffs had bid on, and were denied, vacant second officer positions prior to reaching age 60, plaintiffs here have made no showing that positions were available and that they were denied vacant positions to which they were entitled. The issue posed by these motions is whether age-60 captains seeking to downbid to second officer po-

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[1]The motion of plaintiff White, however, who was a second officer at the time he reached age 60, was granted. "Plaintiffs" in this opinion means all plaintiffs, except plaintiff White.

sitions may continue to retain their seniority rights after age 60 and exercise them when vacancies occur. While in *Criswell, supra,* 514 F.Supp. at 391 n.13, the court recognized that in an otherwise neutral setting Western was not obligated to offer retiring captains positions where none exist upon their attaining age 60, it has never addressed the question of whether, in light of its other employment practices discussed below, Western's policy of severing age-60 captains from the company, notwithstanding their desire to become second officers as positions become available, is violative of the ADEA.

The issue must be examined in light of the somewhat unusual employment practices of Western. Although in many industries, retirement from, or loss of, a particular position terminates the entire employment relationship, this is not always the case with Western. An examination of the evidence presented by plaintiffs,[2] as well as the terms of the collective bargaining agreement (the "Pilot Agreement") between Western and the Air Line Pilots Association ("ALPA"), reveals that flight deck employees who lose their jobs due to elimination of particular flights or positions, or due to medical disabilities, are not severed from employment. Instead, they are allowed, through various mechanisms, to displace other employees, go on furlough, or simply remain in Western's employ in a "displacement pool." It is against this backdrop that plaintiffs' claims of unlawful discrimination must be considered.

In denying plaintiffs' motion for a preliminary injunction, the Court found that plaintiffs had not shown that they had

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[2]The primary ground which supports plaintiffs' motion for reconsideration is, literally, newly-discovered evidence; evidence which plaintiffs have obtained in discovery conducted after the motion for preliminary injunction was heard and determined.

a fair chance of success on the merits. *Benda v. Grand Lodge, IAM,* 584 F.2d 308, 314-15 (9th Cir. 1978), *cert. dismissed,* 441 U.S. 937, 99 S.Ct. 2065, 60 L.Ed.2d 667 (1979). This decision was based on the grounds that plaintiffs had not established a *prima facie* case, and that even if they had, evidence submitted by ALPA regarding operation of the seniority provisions appeared to rebut the *prima facie* case. Pursuant to plaintiffs' present motion, the Court has now considered the additional evidence adduced and reevaluated the grounds for its previous decision in light of that new evidence, and has concluded that plaintiffs have raised serious questions regarding the lawfulness of Western's employment policies and that they have a fair chance of success on the merits.

1. *Probability of Success on the Merits*

a. *Prima Facie Case Based on Discriminatory Treatment*

It is well-established that a *prima facie* case of age discrimination may be established by showing either discriminatory treatment or disparate impact. *Douglas v. Anderson,* 656 F.2d 528, 531 (9th Cir. 1981); *Kelly v. American Standard,* 640 F.2d 974, 980 (9th Cir. 1981); *cf. Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 252 n.5, 101 S.Ct. 1089, 1093, n.5, 67 L.Ed.2d 207 (1981) (dictum recognizing that factual issues and character of proof differ under each theory); *Grant v. Bethlehem Steel Corp.,* 635 F.2d 1007, 1013 (2d Cir. 1980), *cert. denied,* 452 U.S. 940, 101 S.Ct. 3083, 69 L.Ed.2d 954 (1981) (analysis of Title VII case under both theories). In the Memorandum Decision, I found that five of the plaintiffs had not established a *prima facie* case of intentional discrimination in that they had not shown the existence of a vacancy in the job sought. *Teamsters v. United States,* 431 U.S. 324, 358 n.44, 97 S.Ct. 1843, 1866 n.44, 52 L.Ed.2d 396 (1977),

citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Nanty v. Barrows Co.*, 660 F.2d 1327, 1332 (9th Cir. 1981). I based that decision on the fact that the existence of a vacancy in the job sought is the second element of the well-known *McDonnell Douglas* formula for establishing a *prima facie* case of discriminatory treatment. *McDonnell Douglas Corp., supra*, 411 U.S. at 802, 93 S.Ct. at 1824. Many recent cases, however, recognize that the *McDonnell Douglas* test can and should be modified to accommodate differing factual circumstances. *E.g., Douglas, supra*, 656 F.2d at 532; *Grant, supra*, 635 F.2d at 1014; *Loeb v. Textron*, 600 F.2d 1003, 1014 (1st Cir. 1979). The overriding inquiry in the recent cases is whether the evidence is sufficient to support an inference of discrimination. This test may be satisfied by producing evidence that identifies age as the likely reason for an adverse employment decision. *Douglas, supra*, 656 F.2d at 532.

Viewed in this light, plaintiffs, on reconsideration, have presented evidence which supports a theory of discriminatory treatment. They rely in part on deposition testimony of Western employees Richard Mitchell, Robert Fitch, Donald Vena and William Newell, which indicates that Western routinely set aside and refused to consider the bids of captains nearing age 60 seeking second officer positions. Additionally, plaintiffs point to Western's Statement of Corporate Policy, adopted after the decision in *Criswell*, as manifesting continued intent to discriminate on the basis of age. Finally, they rely on evidence, first presented in *Criswell*, that a majority of pilot movement occurs not through bidding for vacancies, but through displacement and other mechanisms. This point is underscored by evidence that Western and ALPA signed a special agreement, outside of the regular Pilot Agreement, for the sole purpose of maintaining the employee status of 737 second officers whose positions had been eliminated. No such efforts were made to accommodate age-60 captains seeking second officer positions.

ALPA claims that, by virtue of the operation of the neutral seniority rules, plaintiffs would not have been awarded second officer positions even had their bids been considered. Under ALPA's theory, plaintiffs failed to establish a *prima facie* case of age discrimination in that they did not establish that there were vacancies for which they were eligible. The lack of vacancies in the position sought would, therefore, eliminate age as the likely reason for an adverse employment decision.[3]

The question of whether plaintiffs have shown that age was the likely reason for an adverse employment decision can be answered only by first determining precisely what "employment decision" is in issue. Under ALPA's view of the case, the only "employment decision" in issue is whether Western would have been justified in denying plaintiffs employment on the ground that, at the time plaintiffs retired as captains, there were no second officer positions to which they were entitled. Under plaintiffs' view of the case, Western's "employment decision" encompasses the entire spectrum of its treatment of age-60 captains; more specifically, plaintiffs focus on Western's mandatory retirement and severance from the company of age-60 captains seeking to obtain second officer positions in the event that no such positions are immediately available.

Consistent with *Criswell*, and with what appears to be the reality of Western's employment practices, a broader view of the term "employment decision" should be adopted.

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[3]This rationale was adopted in the Memorandum Decision, denying the preliminary injunction.

The evidence submitted by plaintiffs in conjunction with this motion, establishes that Western's "employment decision" in this case consisted of more than the mere processing of bids according to a seniority system. If one views downward movement of Western pilots as a whole, including movement by displacement, it becomes apparent that age-60 captains seeking to downbid are the only individuals who are severed from the company rather than allowed to maintain their employee status until such time as a vacancy occurs. Plaintiffs have presented sufficient evidence to establish a likelihood that age is a determining factor in Western's failure to consider their applications, and in Western's refusal to accommodate them in the same manner in which other employees are accommodated. I therefore, find that they have, for the purpose of these motions, established a *prima facie* case based on discriminatory treatment.

b. *Disparate Impact*

Upon reconsideration, it appears likely that plaintiffs can also establish a *prima facie* case based on a disparate impact theory. To do so, they need only establish that despite the facial neutrality of a particular policy, its impact falls more heavily on one group than another. *Grant, supra,* 635 F.2d at 1015. Under such a theory, the plaintiff is relieved of the burden of proving discriminatory motive, *Id.* at 1014, and the focus of the case changes from particular employment decisions to consideration of general policy toward particular groups of individuals.

The evidence submitted by plaintiffs tends to show that, notwithstanding ALPA and Western's contention that current employment policies are neutral, their impact falls more heavily on age-60 captains seeking to become second officers. For example, the company has seen fit to adopt programs outside of the Pilot Agreement, such as the 737

Second Officer Pool, which are designed to maintain the employment status of employees without positions, but has not extended this benefit to age-60 captains. I find that the consequences of such policies appear to be discriminatory, and therefore, that the plaintiffs have established a *prima facie* case based on disparate impact.

c. *Rebuttal of Prima Facie Case*

Once plaintiffs have established a *prima facie* case, the defendant bears the burden of coming forward with evidence to rebut the inference of discrimination. *EEOC v. County of Santa Barbara*, 666 F.2d 373, 375 (9th Cir. 1982). Western and ALPA have chosen to defend this action, at least in part, on the ground that the company's policy is justified by a *bona fide* seniority system, and is therefore exempt under § 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2).

Upon reconsideration of the arguments raised by both sides, I am persuaded that Western's seniority system is not an issue in these motions. It is true that ALPA has demonstrated, based on various seniority provisions in the Pilot Agreement, that had plaintiffs' bids been considered, they would not have been awarded second officer positions. Nonetheless, viewing this case from a broader perspective, it is apparent that plaintiffs' alleged injury stems not from the application of particular seniority rules, but rather from a policy, *nowhere embodied in the Pilot Agreement*, which equates retirement as a captain at age 60 with a complete severance from the company.

Given the totality of Western's employment practices, there is a serious question whether mandatory severance from the company at age 60, notwithstanding a desire to fill a position which is not subject to the FAA's Age 60 rule[4] is permissible under the ADEA. As stated in the May

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[4]14 C.F.R. § 121.383(c). *See Criswell, supra,* 514 F.Supp. at 389, for a discussion of this rule.

4, 1979 Opinion Letter by the Administrator of the Wage and Hour Division of the United States Department of Labor:

> "In summary, while the ADEA does not require that a carrier provide, in each and every case, an alternate assignment for pilots subject to the FAA's Age 60 Rule, such persons must be considered for reassignment (or for training prior to reassignment) to positions not covered by the Rule. . . . e must not be either a direct or indirect consideration; the 60 year-old pilot must be treated on the same basis as other employees or applicants for employment."

Quoted in Monroe v. United Air Lines, 27 Empl.Prac.Dec. (CCH) ¶ 32,230 (N.D.Ill. 1981) at 22,683. Thus, although Western may not be obligated to provide immediate employment for pilots retiring from captain positions, it cannot deny them the opportunities which it apparently affords to its other employees — the retention of seniority rights and the right to exercise them at such time as a vacancy occurs.

It bears repeating that the above analysis does not turn on the validity or invalidity of Western's seniority system. The validity of the system under § 4(f)(2) is not germane, given that it is not the operation of the seniority system which is alleged to have harmed the plaintiffs. Thus, I find it unnecessary to address the issue of whether the Supreme Court's recent decision in *American Tobacco Co. v. Patterson*, ___ U.S. ___, 102 S.Ct. 1534, 71 L.Ed.2d 748 (1982), is applicable to this case.

II. *Denial of Summary Judgment*

It follows from the reasoning set forth above that defendant's motion for summary judgment must be denied. As explained above, it appears that the roots of the alleged age discrimination lie outside of the seniority system. Western's motion for summary judgment relies solely on the seniority

system as a defense to plaintiffs' claims of unlawful discrimination and that system does not provide a defense. Accordingly, I am unable to conclude that Western is entitled to summary judgment.

III. *Reconsideration of Preliminary Injunctive Relief*

In this Circuit, a party seeking a preliminary injunction may meet its burden by demonstrating either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in its favor. *Los Angeles Memorial Coliseum Com'n v. N. F. L.*, 634 F.2d 1197, 1201 (9th Cir. 1980); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 526 F.2d 86, 88 (9th Cir. 1975). The basic function of a preliminary injunction is to preserve the *status quo ante litem* pending a determination of the action on the merits. *Los Angeles Memorial Coliseum Com'n, supra*, 634 F.2d at 1200.

Plaintiffs have asked for preliminary injunctive relief in the form of reinstatement.[5] Based on the analysis of this case as set forth above and on equitable considerations, I conclude that plaintiffs should not be granted reinstatement pending trial. This is because Western's alleged discrimination consists not of denying plaintiffs particular positions, but of failing to treat them in the same manner in which other Western employees are treated. More precisely, Western's alleged discrimination lies in its failure to allow plain-

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[5]Neither the motion for preliminary injunction nor the renewed motion for preliminary injunction and for reconsideration specified the precise nature of the preliminary injunctive relief sought. However, at oral argument, plaintiffs were unequivocal that what they seek is immediate reinstatement as second officers and not placement in a "pool" or other standby treatment. Under the ADEA and for purposes of preliminary injunctive relief, "reinstatement" is not an accurate characterization of the relief sought, since plaintiffs were terminated from positions as captains and not as second officers.

tiffs to retain employee status and seniority rights, even in the absence of immediate positions, when other employees are allowed to do so. For this reason, reinstatement appears to be a remedy which exceeds plaintiffs' present injury.[6]

In addition, even if reinstatement were an appropriate remedy for the injury alleged, it would not be warranted in that the balance of hardships does not tip sharply in favor of plaintiffs. Preliminary injunctive relief will not serve to preserve the *status quo ante litem*, in that none of the plaintiffs was employed as a second officer when this action was filed.[7] Moreover, all plaintiffs, except plaintiff Butler, were terminated by Western prior to the commencement of this action. In addition, Western claims that if plaintiffs were reinstated, certain incumbents might have to be discharged. The harshness of this result, particularly at the preliminary injunction stage, is another factor militating against it.

Plaintiffs have not requested preliminary injunctive relief other than reinstatement (*e.g.*, an order restoring their seniority and bidding rights) and the Court declines to fashion such a remedy at this time. First, while plaintiffs raise serious questions on the merits, the record is, as yet, relatively undeveloped. For example, the Court has only skeletal information regarding the creation of, or circumstances surrounding, the 737 Second Officer Pool. The existence of this "pool" appears to be a key element of plaintiffs' proof

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[6]I continue to adhere to the view expressed in the Memorandum Decision that, for the purposes of determining these motions, plaintiffs were not entitled, under the neutral operation of Western's seniority system, to be awarded any of the vacancies which occurred prior to their reaching age 60.

[7]*See* footnote 5, *ante*. Because this is not a true "reinstatement" case, plaintiffs appear to be seeking a mandatory preliminary injunction to which a more stringent standard applies than would be applicable in the case of prohibitory relief. *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1979).

of discriminatory treatment and disparate impact. In addition, any limited injunctive relief which the Court might issue would pose numerous practical and administrative problems which should not be decided on the basis of the current, limited record. One such issue is what impact such relief would have on the retirement benefits currently being received by plaintiffs. In light of the weakness of the record, the practical problems which have yet to be considered and the fact that plaintiffs have not asked for any preliminary injunctive relief other than reinstatement, I find it improper to fashion a more limited remedy at this time and decline to do so.

Order:

1. Plaintiffs' motion for reconsideration is granted and on reconsideration the motion for preliminary injunction is denied.

2. Western's motion for summary judgment is denied.

Memorandum Order of Preliminary Injunction.

United States District Court, Central District of California.

Westcot B. Stone, III, et al., Plaintiff, v. Western Air Lines, Inc., Defendant.

Western Air Lines, Inc., Third Party Complainant, v. Air Line Pilots Association, International, et al., Third Party Defendants.

No. CV 81-5521 AWT.

Filed: March 9, 1984.

On February 27, 1984, plaintiffs orally, at the hearing in open court, F. R. Civ. P. 7(b)(1), renewed their motion for preliminary injunction, first made in 1981. They seek to be reinstated to their employment with defendant Western Air Lines, Inc. ("Western") in the position of DC-10 Second Officer. Eight of the plaintiffs (Westcot B. Stone, III, Norval P. Cavett, Bill H. Pelton, Jack R. Dean, Brentnall J. Higgs, Henry J. Wiegand, Alan J. McClaren, and Robert L. Butler) were parties to the 1981 motion. Since then, three additional plaintiffs (Neil S. Foster, Eugene R. Black and Jack L. Keyes) have joined the lawsuit pursuant to the opt-in procedures of 29 U.S.C. §216(b). These eleven plaintiffs, movants here, were DC-10 Captains with Western up to their sixtieth birthdays. A twelfth plaintiff, Albert J. White, worked as a DC-10 Second Officer prior to age sixty and previously was granted a preliminary injunction to continue in that position. Mem. Decision & Order, Dec. 17, 1981, *aff'd, Criswell v. Western Air Lines, Inc.*, 709 F.2d 554, 558 (9th Cir. 1983).

The Court heard extensive argument from counsel for plaintiffs, Western and third-party defendant Air Line Pilots Association, International ("ALPA"). In addition, on February 28, 1984, testimony was received regarding the impact of plaintiffs' reinstatement on the status quo. Further, ref-

erence was made to matters previously before this Court in this case and in *Criswell*, and to the orders and opinions therein. *Criswell*, 514 F.Supp. 384 (C.D. Cal. 1981), *aff'd*, 709 F.2d 544 (9th Cir. 1983); *Stone*, Mem. Decision and Order, December 17, 1981, *on reconsideration*, 544 F.Supp. 33 (C.D. Cal. 1982). Each party has submitted its own proposed form of order.

Plaintiffs' renewed motion continues to seek not merely reinstatement of seniority and bidding rights (*cf.*, 544 F.Supp. at 38-39); it also seeks immediate assignment to DC-10 Second Officer positions now occupied by junior pilots. Western, although not joining in plaintiffs' motion, has not opposed plaintiffs' reinstatement *pendente lite* for the reasons heretofore made of record. The "pool" concept embodied in the preliminary injunction was advanced by Western. ALPA, although not opposing reinstatement *per se*, continues to oppose any reinstatement that will cause displacement of incumbent pilots.

Since this matter was last before the Court, the likelihood that plaintiffs will ultimately be entitled to reinstatement has been increased by the affirmance of *Criswell v. Western*, 709 F.2d 544 (9th Cir. 1983). Although that likelihood could be materially affected by a decision of the Supreme Court if it grants certiorari in *Criswell*, which Western has represented it will petition for, and by the Court's decision in *ALPA v. TWA*, 713 F.2d 940 (2d Cir. 1983), *cert. granted*, 52 U.S.L.W. 3624 (Feb. 27, 1984) (No. 83-997), Western's non-opposition to this renewed motion is based on its need to limit further accrual of possible double damages to plaintiffs' while it contests this action on the merits and continues to pursue its appellate remedies in *Criswell*. The impact of plaintiffs' reinstatement upon incumbent pilots will be materially lessened, if not eliminated, by creation of the temporary "pool" hereinafter ordered. The Court finds that

these new factors shift the balance of equities in favor of granting plaintiffs' motion for reinstatement *pendente lite*.

Plaintiffs' motion rests upon application of collateral estoppel to the *Criswell* judgment's holding that age sixty is not a BFOQ for Second Officers. Mem. Decision & Order, Dec. 17, 1981. That judgment premised its BFOQ ruling upon the finding that Western failed to carry its burden of proof on the BFOQ defense. 514 F.Supp. at 390, 397; 709 F.2d at 559. The record in *Criswell* demonstrated the availability to Western of medical testing techniques not presently permitted by the Pilot Agreement which would adequately protect the safety of Western's flight operations. The 1981 *Criswell* judgment permitted such additional medical testing "pending Western's renegotiation of the Pilot Agreement." 514 F.Supp. 397. The record on this motion indicates that the medical testing provisions of the Pilot Agreement were neither renegotiated nor that Western and ALPA bargained to an impasse on the issue, although the Pilot Agreement has since been renewed. The record is silent as to why Western has made no progress on this score in the three years since the *Criswell* decision. Western, here, appears to assert the inconsistent positions that (i) the Pilot Agreement prohibits it from administering additional testing to reinstated plaintiffs, and (ii) to require it to bargain with ALPA on the issue of further testing would give ALPA "a collective bargaining veto over safety standards" contrary to law, citing *World Airways, Inc. v. IBT, Airline Div.*, 578 F.2d 800 (9th Cir. 1978). It cannot have it both ways.

It is sufficient on this motion that equity and an appropriate regard for public safety require that plaintiffs not seek the benefits of *Criswell* without its medical testing burdens, as was required as a condition to the preliminary injunction in favor of plaintiff Albert J. White. Because similar safety considerations are applicable to ALPA, it is appropriate that

Western and ALPA confer further on this issue.

Finally, for the purpose of satisfying the requirement of F. R. Civ. P. 52(a), the remaining portions of the Court's previous opinion, 544 F.Supp. 35, are incorporated herein. Accordingly, based on all the matters before the Court, plaintiffs' renewed motion for preliminary injunction is GRANTED, and it is ORDERED:

1. Pending trial on the merits, plaintiffs who so elect shall be reinstated to their employment with Western with full seniority.

2. In order to be reinstated, each plaintiff electing reinstatement shall serve on Western and file with the Court by March 19, 1984, his certificate electing reinstatement.

3. Western shall provide each plaintiff electing reinstatement with Western's usual and customary training to qualify as a DC-10 Second Officer. Such training shall commence promptly. Western's statement to the Court of its intention to begin electing plaintiffs' training in two sessions starting March 26, 1984 and April 9, 1984, if carried out, satisfies the promptness requirement.

4. For each plaintiff who elects reinstatement and qualifies as a DC-10 Second Officer, Western shall assign him to a DC-10 Second Officer position commensurate with his seniority and consistent with Western's operational requirements.

5. On March 19, 1984, Western shall create a surplus pilot "pool" equal to the number of plaintiffs electing reinstatement. That "pool" shall initially constitute a surplus in the DC-10 Second Officer position. Western shall have the option of maintaining all or part of the surplus "pool" in the DC-10 Second Officer position, or of spreading the "pool" throughout the system by announcing bid vacancies in higher (Captain or First Officer) positions; the decision

of any incumbent DC-10 Second Officer to bid for these vacancies is entirely voluntary.

6. The "pool" shall be maintained until it is shrunk to zero. The number of surplus positions in the "pool" shall be reduced on a one-for-one basis, upon the occurrence after March 19, 1984 among Western pilots of any of the following:

a. lack of successful completion of Second Officer training by electing plaintiffs;
b. voluntary normal retirement at age 60;
c. early retirement;
d. disability retirement;
e. death;
f. termination;
g. resignation.

7. Western may, until the first renewal of the Pilot Agreement, administer to Second Officers over age 60, at Western's expense, such medical examinations in addition to the FAA second-class airman's examination, which Western deems appropriate to enable it to discharge its responsibility as a certificated air carrier. This is pending further order of the Court and is subject to the report required below. If, at the time of first renewal of the Pilot Agreement, Western and ALPA bargain to an impasse on this issue, Western may return to Court for such further relief as it deems necessary.

8. Western and ALPA meet and discuss the following items, and shall submit a report to the Court on or before May 15, 1984 as to:

(a) whether plaintiffs' reinstatement under the conditions of this injunction has caused or is likely to cause an unfair effect on junior pilots and, if so, whether there is an equitable way to alleviate that unfair effect, consistent with Western's obligations under law.

(b) additional medical and/or proficiency testing for Second Officers age sixty and older.
(c) the treatment of pension benefits of pilots working beyond the normal retirement age of sixty.
(d) under the assumption that pilots approaching age sixty may be permitted by Court Order to work as Second Officers beyond age sixty, the appropriate mechanism for transfer of pilots to Second Officer, and the impact, if any, upon other pilots.

9. Based on the Court's oral ruling at the hearing and because neither Western nor ALPA has made a request therefor, no bond will be required under Fed R. Civ. P. 65(c).

10. This Preliminary Injunction shall be binding upon Western, upon ALPA, upon all Western pilots represented by ALPA having notice thereof, and upon all persons acting under their authority or in concert therewith.

Dated: Mar 9 1984

/s/ A. Wallace Tashima
A. WALLACE TASHIMA
United States District Judge

Statutes and Regulations Involved.

Section 4(f) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §623(f), provides:

> "It shall not be unlawful for an employer, employment agency, or labor organization:
>
> "(1) to take any action otherwise prohibited under subsections (a), (b), (c) or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;
>
> "(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or
>
> "(3) to discharge or otherwise discipline an individual for good cause."

Section 204 of the Railway Labor Act, 45 U.S.C. §184, provides:

> "The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to

> an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.
>
> "It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of sections 181 and 188 of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.
>
> "Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in sections 151 and 163 and 181 to 188 of this title shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of sections 181 to 188 of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction."

Section 601(b) of the Federal Aviation Act, 49 U.S.C. §1421(b), provides:

> "In prescribing standards, rules, and regulations, and in issuing certificates under this subchapter, the Administrator shall give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest and to any differences between air transportation and other air commerce; and he shall make classifications of such standards, rules, regulations, and certificates appropriate to the differences between air

transportation and other air commerce. The Administrator may authorize any aircraft, aircraft engine, propeller, or appliance, for which an aircraft certificate authorizing use thereof in air transportation has been issued, to be used in other air commerce without the issuance of a further certificate. The Administrator shall exercise and perform his powers and duties under this chapter in such manner as will best tend to reduce or eliminate the possibility of, or recurrence of, accidents in air transportation, but shall not deem himself required to give preference to either air transportation or other air commerce in the administration and enforcement of this subchapter."

Section 121.383(c) of the Federal Aviation Regulations ("the FAA's Age 60 Rule"), 14 C.F.R. §121.383(c), provides:

"No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday."

OPPOSITION

BRIEF

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No. 83-1545

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WESTERN AIR LINES, INC.,

Petitioner,

v.

CHARLES G. CRISWELL, ALBERT RON and RULON H. STARLEY,

Respondents.

WESTERN AIR LINES, INC.,

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v.

WESTCOT B. STONE, III, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether, in an ADEA action, it was correct not to give absolute deference to an arbitration decision, and whether the "bona fide seniority system" defense was inapplicable.

2. Whether the parties' respective burdens to prove "age as a determining factor" and "reasonable factors other than age" were correctly assigned.

3. Whether the jury was properly instructed on Western's "bona fide occupational qualification" defense.

4. Whether the Court of Appeals was correct in finding harmless error in the trial court's pretext instruction.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
COUNTERSTATEMENT OF THE CASE	2
A. Proceedings Below	2
B. The Flight Deck Crew on Western	3
C. Western's System of Individualized Testing	5
D. The Downbidding Issue and System Board Decision	7
REASONS THE WRIT SHOULD NOT BE GRANTED	10
I. THE PETITION RAISES NO LEGITIMATE ISSUE REGARDING THE "BONA FIDE SENIORITY SYSTEM" DEFENSE OR THE SYSTEM BOARD DECISION	11
II. THE JURY WAS CORRECTLY INSTRUCTED AS TO THE PARTIES' RESPECTIVE BURDENS TO PROVE "AGE AS A DETERMINING FACTOR" AND "REASONABLE FACTORS OTHER THAN AGE"	13
III. THE JURY WAS CORRECTLY INSTRUCTED ON WESTERN'S BFOQ DEFENSE	15
IV. THE NINTH CIRCUIT'S TREATMENT OF PRETEXT IS NOT IN CONFLICT WITH ANY OTHER DECISION	19
CONCLUSION	20

TABLE OF AUTHORITIES

Cases	Page
Air Line Pilots Association, International v. Trans World Airlines, Inc., 713 F.2d 940 (2d Cir. 1983), *cert. granted*, 104 S.Ct. 1412 (1984)	12, 13, 14, 18
Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)	11
Arritt v. Grisell, 567 F.2d 1267 (4th Cir. 1977)	16
Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981)	11
Corning Glass Works v. Brennan, 417 U.S. 188 (1974)	14
Criswell v. Western Air Lines, Inc., 514 F.Supp. 384 (C.D. Cal. 1981), *aff'd*, 709 F.2d 544 (9th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3722 (March 16, 1984)	*passim*
Dothard v. Rawlinson, 433 U.S. 321 (1977)	17
EEOC v. City of St. Paul, 671 F.2d 1162 (8th Cir. 1982)	16, 18
EEOC v. County of Los Angeles, 706 F.2d 1039 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 984 (1984)	16, 18
EEOC v. County of Santa Barbara, 666 F.2d 373 (9th Cir. 1982)	14, 16
Harriss v. Pan American World Airways, Inc., 649 F.2d 670 (9th Cir. 1980)	15, 17
Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975)	17
Houghton v. McDonnell Douglas Corp., 553 F.2d 561 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977)	16
Johnson v. American Airlines, Inc., 31 Empl.Prac. Dec. [CCH] ¶33,417 (N.D. Tex. 1983)	12
Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979)	15

Monroe v. United Air Lines, Inc., 27 Empl.Prac. Dec. [CCH] ¶32,230 (N.D. Ill. 1981) 18
Murnane v. American Airlines, Inc., 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982) 16
Orzel v. City of Wauwatosa Fire Department, 697 F.2d 743 (7th Cir.), *cert. denied*, 104 S.Ct. 484 (1983) 16, 17, 18
Smallwood v. United Air Lines, Inc., 661 F.2d 303 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982) 16
Stewart v. Smith, 673 F.2d 485 (D.C. Cir. 1982) . 16
Stone v. Western Air Lines, Inc., 544 F.Supp. 33 (C.D. Cal. 1982) 3, 12
Tennessee v. Dunlap, 426 U.S. 312 (1976) 12
Tuohy v. Ford Motor Co., 675 F.2d 842 (6th Cir. 1982) 16, 17, 18
Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976) 15, 16, 17

STATUTES, REGULATIONS, AND COURT RULES

Age Discrimination in Employment Act,
29 U.S.C. §621 *et seq.* ..... *passim*
29 U.S.C. §623(f)(1) 5, 8, 14, 17
29 U.S.C. §623(f)(2) 7, 12, 13
Equal Pay Act,
29 U.S.C. §206(d) 14
Federal Aviation Regulations,
14 C.F.R. §67.13 5
14 C.F.R. §67.15 5
14 C.F.R. §121.383(c) 3
14 C.F.R. §121.385 3
14 C.F.R. §121.385(d) 4
14 C.F.R. §121.387 3
14 C.F.R. §121.557 4
Supreme Court R. 17.1 10

IN THE

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WESTERN AIR LINES, INC.,

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WESTCOT B. STONE, III, et al.,

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents Charles G. Criswell, Albert Ron, and Rulon H. Starley (the *Criswell* respondents) and respondents Westcot B. Stone, III, *et al.* (the *Stone* respondents)[1] respectfully pray that the Petition for a Writ of Certiorari of Western Air Lines, Inc. (Western) be denied.

[1] Unless otherwise noted, references in this brief to "respondents" are to the *Criswell* respondents.

COUNTERSTATEMENT OF THE CASE

A. Proceedings Below

These cases challenge Western's practice of mandatorily retiring all flight deck crewmembers at age sixty and its refusal to permit Captains approaching age sixty to transfer to flight engineer (Second Officer) positions. The *Criswell* respondents brought their action under the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* (ADEA) in 1978. Following a 15-day trial in 1980, a jury found that Western had willfully violated the ADEA in taking the challenged actions with respect to each respondent's employment.[2] The trial court then issued findings based upon its independent review of the evidence and ordered equitable relief, including reinstatement of Criswell and Starley. 514 F.Supp. 384 (A31-59).[3] The preliminary injunction in favor of Ron, who had continued as a flight engineer beyond age sixty during the litigation (*see* A34), was made permanent.

Following the district court's decision in *Criswell*, the *Stone* respondents filed a follow-up ADEA action in 1981.

[2] Respondents Criswell and Starley were serving as DC-10 Captains at the time of their sixtieth birthdays, Ron as a DC-10 flight engineer (Second Officer). Criswell had worked for Western for forty-one years, Starley for thirty-two. Respondent Ron was a "career" flight engineer, and had been employed by Western for thirty-two years (A2-3). Criswell and Starley alleged age discrimination in Western's refusal to permit them to "downbid" to flight engineer positions. All three respondents challenged their mandatory retirement.

[3] The following abbreviations are used in this brief: "A ____" refers to the Appendix to Western's Petition for a Writ of Certiorari; "P ____" refers to Western's Petition for a Writ of Certiorari; "Tr. ____" refers to the transcript of the trial in *Criswell*.

The court, relying on collateral estoppel principles, granted a preliminary injunction reinstating *Stone* respondent White (A95). Western appealed that order, along with the judgment on the merits in *Criswell*. A unanimous Ninth Circuit panel affirmed the district court in all respects. 709 F.2d 544.[4]

B. The Flight Deck Crew on Western

Under the Federal Aviation Regulations (FAR), 14 C.F.R. Part 121, Western operates its DC-10 aircraft with a complement of three flight deck crewmembers, a Captain (pilot-in-command), First Officer (copilot or second-in-command), and Second Officer (flight engineer).[5] The FAA's "Age 60 Rule" provides that no person may serve as Captain or First Officer after age sixty. 14 C.F.R. §121.383(c). That regulation does not apply to the flight engineer position (A2; *see* A35, A71).

The flight engineer job was described by the trial court as follows:

> [A] distinction must be made between the duties of a flight engineer, on the one hand, and the duties of a pilot (including copilot), on the other. On a wide-bodied aircraft the flight engineer sits at his own in-

[4] On March 9, 1984, the district court issued a preliminary injunction allowing reinstatement of the remaining *Stone* plaintiffs (A112-117). The district court incorporated findings from its 1982 decision in *Stone*. 544 F. Supp. 33 (A101-111). Plaintiffs' motion for summary judgment in *Stone* on the issues of liability and willfulness is under advisement.

[5] Western is incorrect in asserting that the FAR require it to employ three "pilots" on the DC-10 aircraft. The FAR provide only that aircraft such as the DC-10 shall be operated by two pilots and a flight engineer. 14 C.F.R. §§ 121.385, 121.387. Western's Second Officers are not qualified or trained as pilots on Western's aircraft, and do not perform pilot functions (Tr. 10-11).

strument panel. His function during normal flight is to monitor and adjust a number of the systems which are necessary to the operation of the aircraft, such as the hydraulic and electrical systems. He does not manipulate the flight controls. Thus, his normal duties are less critical to the safety of flight than those of a pilot. [6] He does have important contingency duties in emergency situations, such as an all-engine flameout. Even if the flight engineer were to become incapacitated in flight, the crew redundancy concept employed by Western and other carriers provides for other members of the flight deck crew to perform the necessary procedures of the flight engineer until the aircraft can be landed at the nearest available airport. Although testimony at the trial indicated that a number of tragedies have resulted from pilot incapacitations during flight, none has ever come about because of the incapacitation of a flight engineer. [7]

[6] Contrary to Western's statement that the flight engineer's duties "overlap considerably" with those of the two pilots, Western's Vice President of Flight Operations acknowledged that the Second Officer gives no commands and has no responsibility for the conduct of the flight (Tr. 2044; *see* Tr. 47, 454).

[7] Western's argument that the rationale underlying the Age 60 Rule applies equally to the flight engineer assumes that the risk to safety when the flight engineer is incapacitated is equivalent to that accompanying the incapacitation of one of the pilots. This was flatly contradicted by the testimony of Western's two top flight operations officials that there is a lower risk of harm to the public if the flight engineer is incapacitated (Tr. 454, 2044).

Further, the district court relied on the testimony of Western's chief pilot in finding that Captains and First Officers are trained to perform flight engineer duties in the event of an incapacitation (Tr. 397). It is precisely the FAA's crew redundancy concept that preserves safety in the rare event of an incapacitation (Tr. 329, 680-81, 684). The FAR require that one other crewmember be qualified to perform flight engineer duties on an emergency basis. 14 C.F.R. §121.385(d). The regulation cited by Western barring the performance of multiple functions (P. 17) has no bearing in an emergency, such as an incapacitation. *See* 14 C.F.R. § 121.557.

(A37-38). The FAA imposes no age limitation on flight engineers. Western's expert witness never advocated an age sixty limit for flight engineers during his service as FAA Deputy Federal Air Surgeon (A38-39; *see* Tr. 1521). He acknowledged that average healthy persons in their sixties can perform flight engineer duties (Tr. 1669-70). At the time of trial more than 200 flight engineers over age sixty were employed as wide-body flight engineers on carriers such as American, Pan American, and TWA (A39). Respondent Ron's performance after age sixty was rated as "outstanding" by Western (Tr. 2033).

C. Western's System of Individualized Testing

Western contended that an age less than sixty was a "bona fide occupational qualification" (BFOQ) for the position of Second Officer. 29 U.S.C. §623(f)(1). In addition to the evidence concerning the nature of the flight engineer job, the evidence at trial covered both the medical and operational aspects of Western's system of evaluating crewmember fitness. The FAR specify a comprehensive physical examination that all flight deck crewmembers must pass in order to remain certified. 14 C.F.R. §§67.13, 67.15. Western's expert agreed with respondents' expert that the FAA's examination system is safe (Tr. 1655; *see* Tr. 593). He also testified that he would be "comfortable" with flight engineers "beyond the age of 60" after a one-day comprehensive medical examination (Tr. 1677-78).

The record showed that both the FAA and the airlines have been able to deal with the health problems of pilots on an individualized basis (A38). Crewmembers have been recertified to return to flight duties following serious illnesses, including heart attacks and alcoholism (A38). Similarly, crewmembers who are unable to maintain first-class medical certificates have been permitted to fly on

second-class certificates, their duties restricted to flight engineer (A38). The district court noted that "[t]here is nothing in the record to indicate that these flight deck crewmembers are physically better able to perform their duties than flight engineers over age 60 who have not experienced such events or that they are less likely to become incapacitated" (A38).[8]

In addition to stringent medical evaluations of its crewmembers, Western uses sophisticated devices to train and check their proficiency. Western's computerized flight simulators are so advanced that crewmembers may be fully trained without ever entering an actual airplane (Tr. 2195). The simulators are used to train crewmembers in both routine and emergency procedures covering a variety of situations, including those that cannot be done safely in an airplane (Tr. 520-21, 1531, 2196-98).[9]

Western's training devices provide objectively reliable performance data for persons of all ages (Tr. 2213-14, 531-32, 450-52, 43-45). All Second Officers on Western receive identical checks, regardless of their age. They are

[8] Respondents also presented expert testimony about the aging process and the advancements in diagnostic techniques over the past twenty years that have made predictions of future health status more realistic than ever before (Tr. 601-616, 980-99, 1283, 1574-76, 1589, 1655, 1678). With specific reference to airline pilots, it has been reported that they are the healthiest people in the world, that they age more slowly than the general population, and that they have a markedly lower death rate (Tr. 625, 628-29, 633).

[9] Western's expert medical witness agreed that the simulator "can do just about everything" (Tr. 1430). The training and simulator checking procedures enable Western to evaluate crewmembers' vision, hearing, speech understanding, short and long term memory, learning ability, reaction time, ability to respond to emergencies, and even neurologic conditions that might impair performance (Tr. 634-36, 2200-06).

not assigned to line operations until they complete their checks (Tr. 528, 532-33, 2209-10, 2214). Western has confidence in the abilities of all Second Officers released to the line following simulator training and checking (Tr. 45, 2210). Additional or more frequent checks (including in-flight evaluation) may be given to a crewmember whose proficiency is in question (Tr. 2205, 2210).

The district court relied on all of this evidence in concluding that Western had not established its bona fide occupational qualification defense (A39). The Ninth Circuit, in affirming the district court, held that "the trial court could not, as a matter of law, have determined that this jury was incorrect when it also decided that retirement at the age of sixty was not a BFOQ for second officers" (A14).

D. The Downbidding Issue and System Board Decision

Prior to reaching age sixty, Criswell and Starley both submitted bids for DC-10 Second Officer positions under Western's normal bidding procedures. Starley's bid was awarded in October 1977. He discussed his training with Western's Chief Pilot and its Vice President of Flight Operations (A33; *see* Tr. 354-62). Several months later, Western informed Starley that he would be retired because the pilot pension plan provided for "normal retirement" at age sixty (A33).[10] Similarly, Criswell's bid was denied, not because of a lack of openings or any other

[10] As amended, effective April 6, 1978, the ADEA provides that "no . . . employee benefit plan shall require or permit the involuntary retirement of any individual [between ages 40 and 70] because of the age of such individual." 29 U.S.C. §623(f)(2). Respondents all reached their sixtieth birthdays following the effective date of the amendments.

usual business reason, but only because he was approaching age sixty and because Western had a policy of requiring all flight deck crewmembers to retire at that age (A33).[11]

At trial, Western contended that its refusal to allow Criswell and Starley to transfer to the Second Officer position was based on "reasonable factors other than age," 29 U.S.C. §623(f)(1), relying on a decision of Western's System Board of Adjustment. Criswell and Starley had grieved the denial of their downbids to the System Board, which upheld the denials as not violative of the applicable collective bargaining agreement. The System Board decision, which was issued after respondents had filed their ADEA action, did not address the age discrimination issue. The System Board acknowledged that the language of the agreement would have permitted the downbids, but denied relief on the basis that the parties to the agreement had not contemplated the use of downbidding to avoid Western's mandatory retirement policies (A3; *see* A89). The System Board concluded that Western opposed downbidding in principle and permitted it "only in rare and carefully defined circumstances" (A3, 41).

The evidence clearly contradicted the System Board's depiction of downbidding as a rare occurrence. The district court's extensive findings summarized respondents' evidence showing that they were victims of both discriminatory treatment and disparate impact in the denial of their downbids (A41-43):

[11] Contrary to the assertion in Western's Petition, there was not a shred of evidence to support the notion that Western denied the downbids by interpreting the Pilot Agreement as giving "seniority preference" to junior pilots. An accurate description of the workings of the seniority system is given in the district court's opinion (A39-40).

> Western has permitted, and in certain circumstances required, downbidding in hundreds of instances in a wide variety of circumstances and almost without exception by younger pilots. The only circumstances in which Western has consistently denied downbids is by captains nearing age 60. During the period 1972 to 1979, Western has permitted downbids by or involuntarily downgraded more than 400 pilots. . . . Of special significance to this case is Western's policy, instituted in 1975, of medical downgrades. Under this policy a captain or second officer who cannot hold a FAA first class medical certificate but can hold a second class medical certificate is permitted to continue flying the line as a second officer. Four pilots have been downgraded by Western under this policy including a DC-10 captain who became a second officer at age 56. Downgrades also have occurred as a result of "displacements," which are caused by curtailment of flights and flying time and consequent downward "bumping" by senior pilots whose flights have been cancelled. . . .
>
> Numerous downbids have also been exercised under the widebody downbid provision of the Pilot Agreement. These are downbids which a pilot exercises in order to obtain a position on a widebodied aircraft. There is no restriction on the number of times a pilot can exercise such a downbid and a number of pilots have done so more than once. There was evidence also of a number of downbids permitted by Western, such as "hardship" downbids, which are not sanctioned by any provision in the Pilot Agreement, as is the case with disciplinary downgrades.
>
> It is clear from the above evidence that Western's downbidding policy is not one of allowing downbids in only a few exceptional circumstances, but has sanctioned hundreds of downbids in a wide variety of circumstances, including downbids and downgrades for reasons of health and unilateral downbids not approved by ALPA or the Pilot Agreement. This downbid

policy was administered in such a way as to have a disparate impact on pilots nearing their sixtieth birthday.

The district court concluded that the denial of the downbids was not based on "reasonable factors other than age": "Western had a policy of retiring all flight deck personnel—whether pilots or flight engineers—at age 60 and Western's actions in rejecting these downbids was in accordance with and motivated by that policy" (A43). In upholding the verdict and the district court's opinion, the Court of Appeals relied upon the "great deal of evidence tending to show that Western did not administer its downbidding system in an age-neutral fashion, but rather that it routinely granted exceptions for younger pilots" (A8).

REASONS THE WRIT SHOULD NOT BE GRANTED

The evidence and applicable law in this action have been considered and passed upon three times—by the jury, by the district court (A31-A53), and by the Court of Appeals (A1-A30). The decision each time was fully in respondents' favor. Western's Petition asks this Court to once again review the substantial evidence that supports the decisions below, and to consider questions of law which are well-settled. The Petition should be denied. *See* Sup.Ct. R. 17.1.

I. THE PETITION RAISES NO LEGITIMATE ISSUE REGARDING THE "BONA FIDE SENIORITY SYSTEM" DEFENSE OR THE SYSTEM BOARD DECISION.

Since the inception of the lawsuit, Western has espoused various theories in an attempt to accord absolute deference or conclusive weight to the System Board decision denying the Starley and Criswell downbid grievances. The principal legal argument advanced is that the interpretation of the Pilot Agreement is within the exclusive jurisdiction of the System Board and that the decision may not be reconsidered or collaterally attacked in an ADEA action. The Court of Appeals correctly and amply explained how the more limited use of the System Board decision in this case was in full conformity with this Court's decisions in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) and *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981) (A5-8).[12] At trial, the System Board decision was the mainstay of Western's "reasonable factors other than age" defense. Western was given full opportunity to utilize the decision in the face of respondents' more compelling evidence that Western's downbidding system was not administered in an age-neutral fashion and that downbidding occurred in wide and varied circumstances among younger pilots (A41-43). In fact, by instructing the jury that the denial of the downbids as improper under the Pilot Agreement was "a reasonable factor other than age," the trial court treated the System Board rationale more favorably than the evidence warranted (A8).

[12] Western continues to argue (P. 13) that the fact that the System Board did *not* take into account ADEA rights is all the more reason to defer absolutely to its decision. As correctly emphasized by the Court of Appeals (A6-7), the thrust of *Gardner-Denver* and *Barrentine* is just the opposite.

In its Petition, Western seeks to link the interpretation of the Pilot Agreement in the System Board decision to the "bona fide seniority system" defense in ADEA Section 4(f)(2), 29 U.S.C. §623(f)(2). Western did not even raise that defense in the trial court.[13] On appeal, the Ninth Circuit found it unnecessary to reach Western's argument on the defense because the dispute regarding permissible forms of downbidding under the collective bargaining agreement had been submitted to the jury (A8 n.3). The seniority system defense thus is not an appropriate subject of a petition in this Court. *Cf. Tennessee v. Dunlap*, 426 U.S. 312, 316 n.3 (1976) (assertion not pleaded in the complaint and not considered by the lower courts is not before this Court).

In any event, the bona fide seniority system defense is unavailable to Western as a matter of law. Courts considering the issue have uniformly held that pilots seeking to utilize their seniority to downbid at age sixty are not challenging the seniority system. *Stone*, 544 F.Supp. at 37-38 (A107-08); *Air Line Pilots Association, International v. Trans World Airlines, Inc.*, 713 F.2d 940, 953 (2d Cir. 1983), *cert. granted*, 104 S.Ct. 1412 (1984) (No. 83-997); *Johnson v. American Airlines, Inc.*, 31 Empl. Prac.Dec. [CCH] ¶33,417 at p. 28,890 (N.D. Tex. 1983). Indeed, in its Petition (P.11), Western embraces respondents' statement that the seniority system is not being challenged.

[13] Western's answer raised only one defense under ADEA §4(f)(2), alleging that the retirement of respondents was immunized by the terms of the pilot retirement benefit plan. The district court granted summary judgment in respondents' favor on this issue (A80; *see* A71). Western raised no §4(f)(2) defense on the downbidding issue or its seniority system.

Western's assertion that this Court will be addressing the seniority system defense in *ALPA v. TWA* is totally inaccurate. Neither TWA's petition to this Court, nor the cross-petition of ALPA (No. 83-1325, *cert. granted*, April 2, 1984) raised the §4(f)(2) issue. Issue 3 in TWA's petition challenges the Second Circuit's finding of discriminatory treatment on the basis of age, and does not deal with either the seniority system defense or the issue of disparate impact, as claimed by Western (P.10-11).

II. THE JURY WAS CORRECTLY INSTRUCTED AS TO THE PARTIES' RESPECTIVE BURDENS TO PROVE "AGE AS A DETERMINING FACTOR" AND "REASONABLE FACTORS OTHER THAN AGE."

Western defended its denial of Criswell's and Starley's downbids as based on "reasonable factors other than age," *i.e.*, the provisions in the collective bargaining agreement regarding downbidding and the System Board's interpretation of those provisions. The trial court instructed the jury that this was a reasonable factor other than age (Tr. 2628). It then went on to instruct the jury that they were to consider "whether, taking the evidence as a whole, age was a substantial and determinative factor in Western's refusal to allow either plaintiff to work as a second officer" (*Id.*). The instructions stated several times that plaintiffs bore the overall burden of proof that age discrimination had occurred. (*See* Tr. 2621, 2624, 2626, 2630). Contrary to Western's assertion in its Petition (P.15), the instructions in no sense placed the burden on Western to prove that age was *not* a determining factor.

There was no error in the trial court's formulation of the "reasonable factors" instruction.[14] As the Court of Appeals noted, the "reasonable factors" defense appears alongside the bona fide occupational qualification (BFOQ) exception to the ADEA, 29 U.S.C. §623(f)(1), and is an affirmative defense for which the defendant bears the burden of proof (A16). This is in accord with the general rule that a defendant claiming an exception to a remedial statute bears the burden of proving that its actions fall within the exception. *See Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974). In that case, this Court held that in actions under the Equal Pay Act, 29 U.S.C. §206(d), employers bear the burden of proving that a pay differential is "based on any other factor other than sex." *Id.*; *see* 29 U.S.C. §206(d)(1)(iv).

Furthermore, the instruction given was correct in the context of this case. Here, Western admitted that it discriminated on the basis of age, but attempted to use the System Board decision as a sword to justify its actions.[15] This is different from cases in which age discrimination

[14] In instructing the jury generally on burden of proof, the trial court noted that Western had the burden of establishing its affirmative defenses (Tr. 2617-18). This was repeated in the court's instructions on business necessity and BFOQ (Tr. 2625, 2626-27), but not in the instruction on reasonable factors other than age (Tr. 2628-29).

[15] This is reinforced by Western's appellate attempts to justify the downbidding denials under the bona fide seniority system defense, which is an affirmative defense for which the employer bears the burden of proof. *See, e.g., EEOC v. County of Santa Barbara*, 666 F.2d 373, 375, 377-78 (9th Cir. 1982). As noted in *ALPA v. TWA*, 713 F.2d at 953 n.15, if the seniority system defense is not available to extinguish seniority rights at a particular age—sixty—*a fortiori* the seniority system cannot be used to establish a defense of reasonable factors other than age.

is denied, and the employer uses the other "factor" as a shield for its decision.[16]

In any event, there was substantial evidence to support the finding that age was a determining factor in Western's denial of the downbids. Not only did respondents produce evidence showing that downbids were routinely granted for younger pilots—even in situations not provided for in the collective bargaining agreement (*see* A8, 42-43)—but the jury also heard Western's Chief Pilot admit that the airline had used the bidding procedures to discriminate on the basis of age when it cancelled Starley's bid (Tr. 449). Under these circumstances, the finding that Western's actions were not based on reasonable factors other than age was correct (A8, 43).

III. THE JURY WAS CORRECTLY INSTRUCTED ON WESTERN'S BFOQ DEFENSE.

The trial court's instruction on Western's BFOQ defense was found by the Ninth Circuit to have "track[ed] both the language and the spirit of the circuit law on this matter" (A11). The Ninth Circuit's formulation of the BFOQ, moreover, fully conforms to that of the other circuits.

The BFOQ instruction was based on the test in *Harriss v. Pan American World Airways, Inc.*, 649 F.2d 670, 676-77 (9th Cir. 1980), which adopted the standard first set forth in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 235-36 (5th Cir. 1976). The *Tamiami* standard has been embraced by virtually every court to consider the

[16] The case cited by Western falls within the latter category. That the juries were instructed differently does not create an issue for this Court. *Cf. Loeb v. Textron, Inc.*, 600 F.2d 1003, 1017 (1st Cir. 1979) ("We cannot formulate a charge that should be given in every ADEA case. . . .").

BFOQ issue.[17] No material conflict among the circuits exists on the application of the BFOQ standard.

The instruction given here adapted the *Tamiami* formula to the facts of the case. The jury was instructed that "the normal operation—essence—of Western's business is the safe transportation of air passengers" (Tr. 2626; *see* A9).[18] As to the second *Tamiami* prong, the instruction reiterated that Western was required to show that it could not individually determine the ability of flight engineers over 60 "to perform [the] job safely" or that some flight engineers over age 60 possessed traits "preclud[ing] safe and efficient job performance" that are not ascertainable without knowledge of the individual's age (*id.*). The Court of Appeals held that, by repeatedly emphasizing the safety aspect of Western's business, the instruction "struck a proper balance" as to the "potential tension" between the carrier's statutory duties under the ADEA and the Federal Aviation Act (A12).

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[17] *See, e.g., Orzel v. City of Wauwatosa Fire Department*, 697 F.2d 743, 753 (7th Cir.), *cert. denied*, 104 S.Ct. 484 (1983); *EEOC v. County of Los Angeles*, 706 F.2d 1039, 1042-43 (9th Cir. 1983); *Tuohy v. Ford Motor Co.*, 675 F.2d 842, 845 (6th Cir. 1982); *EEOC v. City of St. Paul*, 671 F.2d 1162, 1166 and n.7 (8th Cir. 1982); *EEOC v. County of Santa Barbara*, 666 F.2d 373, 376 (9th Cir. 1982); *Smallwood v. United Air Lines, Inc.*, 661 F.2d 303, 307 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982); *Arritt v. Grisell*, 567 F.2d 1267, 1271 (4th Cir. 1977); *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561, 564 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977).

Western urges the Court to adopt the test stated in *Murnane v. American Airlines, Inc.*, 667 F.2d 98, 101 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982). Another panel of the D.C. Circuit has endorsed the *Tamiami* test. *Stewart v. Smith*, 673 F.2d 485, 491 n.26 (D.C. Cir. 1982).

[18] The Ninth Circuit noted that Western had adduced a great deal of evidence on emergency procedures, and the jury was thus aware that "normal" operations include emergency situations (A12).

The court's refusal to adopt the "reasonable" or "rational basis" test urged by Western was also proper. First, the statutory language itself requires that a BFOQ be "reasonably *necessary* to the normal operation of the particular business." 29 U.S.C. §623(f)(1) (emphasis added); *see Tuohy, supra*, 675 F.2d at 845.[19] The error in converting the statutory "reasonably necessary" standard to a "reasonable" standard was disposed of in *Harriss*:

> The flaw in the district court's standard as it applies to the BFOQ defense is that it requires only that the policy be "reasonable" in light of the safety factor rather than "reasonably necessary." The district court may have reasoned that the safety factor was so significant that any policy which was "reasonably calculated" to further safety was also "reasonably necessary" in light of Pan Am's strict safety obligations to the public.
>
> Adoption of such a standard here would unnecessarily broaden the BFOQ defense which the Supreme Court characterized in *Dothard v. Rawlinson*, [433 U.S. 321, 334 (1977)] as "an extremely narrow exception to the general prohibition of discrimination. . . ."

649 F.2d at 677; *see* A10-11.

Western attempts to use the FAA's rule for pilots to justify the forced retirement of flight engineers. The Ninth Circuit correctly held that since the flight engineer job was the only one at issue, it would have been improper for the jury instruction to encompass the rationale

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[19] Western sought instructions based on its reading of the "rational basis" test enunciated by the Seventh Circuit in *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975). The Seventh Circuit subsequently rejected Western's reading of *Greyhound* and adopted a test "consistent with" *Tamiami*. *Orzel, supra*, 697 F.2d at 752-53.

of the FAA's Age 60 Rule, which has never been applied to that position (A13).[20] This is in accord with other BFOQ cases involving crewmember positions not covered by the FAA rule. *ALPA v. TWA*, 713 F.2d at 954 (flight engineers); *Monroe v. United Air Lines, Inc.*, 27 Empl. Prac.Dec. [CCH] ¶32,230 (N.D. Ill. 1981) (same); *Tuohy*, 675 F.2d at 845 (corporate pilot). It also is consistent with numerous decisions requiring employers to justify a job restriction as a BFOQ for the *particular* job in question. *See, e.g., City of St. Paul*, 671 F.2d at 1165-66; *Orzel*, 697 F.2d at 749; *County of Los Angeles*, 706 F.2d at 1041-42.

The BFOQ instruction thus fully conformed to *Tamiami*, adapted to the facts of the case. That courts and juries have reached varying results based on evidence presented in different BFOQ cases no more creates an issue for this Court than do opposite results in personal injury actions involving different factual circumstances. Substantial evidence supported the verdict here (A35-39; A14),[21] and the case was submitted on instructions that correctly stated the legal standard and fully apprised the jury of Western's safety obligations.

[20] The evidence at trial, moreover, demonstrated that the flight engineer is far less responsible for the safety of the flight than are the pilots (A37-38). Western's statement that the jobs are "closely akin" (P.17) is thus flatly contrary to the evidence.

[21] After a review of the BFOQ evidence, the Court of Appeals concluded that "the trial court could not, as a matter of law, have determined that this jury was incorrect when it also decided that retirement at the age of sixty was not a BFOQ for second officers" (A14).

IV. THE NINTH CIRCUIT'S TREATMENT OF PRETEXT IS NOT IN CONFLICT WITH ANY OTHER DECISION.

The Court of Appeals agreed with Western that the pretext instruction was erroneous (A19); however, the court explained at length why the error was harmless in this case (A19-23). The Ninth Circuit's extensive explanation presents no issue warranting review by this Court. Western points to no decision which is remotely in conflict with the Court of Appeals decision, either on the issue of pretext or on the application of the harmless error doctrine.

Western's real argument is that the pretext instruction undermined its BFOQ defense. But the trial court specifically instructed the jury that if Western "establishes such a BFOQ by a preponderance of the evidence, then its age discrimination is lawful under the ADEA" (Tr. 2627). Both the trial court and the court of appeals found the jury verdict rejecting the BFOQ defense to be supported by substantial evidence (A14, 35-39). If the pretext instruction was applied by the jury to the BFOQ issue, however, it is likely that the jury understood the instruction as merely reinforcing the need to consider respondents' rebuttal of Western's affirmative defense (*see* A21).[22] Though the Ninth Circuit did not view this approach as

[22] Western's argument that "subjective intent has no bearing" on the BFOQ issue is inconsistent with its argument in the previous section of its Petition that a subjective, good faith belief—in lieu of "absolute truth" (P.22)—is sufficient to establish a BFOQ. More to the point, however, the catalogue of evidence which overcame the BFOQ (A14, 35-39) was "objective" by any standard. None of the authorities cited by Western (P.24) are inconsistent with the Ninth Circuit's treatment of either the BFOQ or pretext issue.

being in strict conformity with the use of pretext as a term of art, Western was not unfairly prejudiced in the outcome.

CONCLUSION

For the foregoing reasons, Western's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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REPLY

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No. 83-1545

IN THE

Supreme Court of the United States

October Term, 1983

WESTERN AIR LINES, INC.,

Petitioner,

vs.

CHARLES G. CRISWELL, ALBERT RON and RULON H. STARLEY,

Respondents.

WESTERN AIR LINES, INC.,

Petitioner,

vs.

WESTCOT B. STONE, III, *et al.*,

Respondents.

REPLY BRIEF OF WESTERN AIR LINES, INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

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(15pp)

TABLE OF CONTENTS

Page

I.

In Its Zeal to Rescue Airline Pilots From the Lawful Impact of the FAA Age 60 Rule, the Criswell Decision, Like the ALPA vs. TWA Decision Already Before This Court (Nos. 83-997, 83-1325), Has Created a Harmful Precedent Which Substantially Destroys ADEA Defenses Granted by Congress to Employers 1

II.

The Pilots Do Not Challenge Western's Contention That the Ninth Circuit Allocation of the Burden of Proof on the Reasonable Factors Defense Conflicts With the Rule in Other Circuits 4

III.

Since Western's Petition Was Filed, the FAA Has Restated Its Rationale for Excluding Flight Engineers From the Age 60 Rule in a Manner Which Makes a BFOQ Clarification by This Court of Even Greater Urgency to the Entire Airline Industry 4

IV.

The Pretext Instruction Made a Self-Nullifying Mockery of the Jury's Consideration of the Business Necessity (BN) and BFOQ Public Safety Defenses 10

V.

Conclusion 11

TABLE OF AUTHORITIES CITED

Cases	Page
ALPA v. TWA, 713 F.2d 940, cert. granted No. 83-997	1, 3, 12
Burwell v. Eastern Airlines, 633 F.2d 361 (4th Cir. en banc 1980), cert. den. 480 U.S. 965	9
Harriss v. Pan American World Airways, Inc., 437 F.Supp. 413, aff'd in pertinent part 649 F.2d 670 (9th Cir. 1980)	9
Hodgson v. Greyhound Lines, Inc., 499 F.2d 59 (7th Cir. 1974) cert. den. 419 U.S. 1122 (1974)	8
Murnane v. American Airlines, 667 F.2d 98 (D.C. Cir., 1981) cert. den. 456 U.S. 915 (1982)	8
Starr v. Federal Aviation Administration, 589 F.2d 307 (7th Cir. 1978)	2
Stone v. Western, 544 F.Supp. 33	3
Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976)	4, 8
Federal Register	
49 Federal Register 14692 (April 12, 1984)	5
49 Federal Register 14693	6, 7
49 Federal Register 14694	7
49 Federal Register 14695	6, 7, 8
Statute	
United States Code, Title 29, Sec. 623(f)(2)	2, 3

No. 83-1545

IN THE

Supreme Court of the United States

October Term, 1983

WESTERN AIR LINES, INC.,

Petitioner,

vs.

CHARLES G. CRISWELL, ALBERT RON and RULON H. STARLEY,

Respondents.

WESTERN AIR LINES, INC.,

Petitioner,

vs.

WESTCOT B. STONE, III, *et al.*,

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REPLY BRIEF OF WESTERN AIR LINES, INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

I.

In Its Zeal to Rescue Airline Pilots From the Lawful Impact of the FAA Age 60 Rule, the Criswell Decision, Like the ALPA vs. TWA Decision Already Before This Court (Nos. 83-997, 83-1325), Has Created a Harmful Precedent Which Substantially Destroys ADEA Defenses Granted by Congress to Employers.

The FAA Age 60 Rule is a legitimate BFOQ under the ADEA (A 35 and fn. 6) *cf. Starr v. Federal Aviation Administration*, 589 F.2d 307, 313 (7 Cir., 1978). The *Criswell* trial court therefore properly and repeatedly ruled that Western could, pursuant to that lawful BFOQ, retire Captains Criswell and Starley if they had not secured a downbid to Second Officer prior to reaching age 60. (A. 71-72, §§4-7, A 80-81, §§5-8, A 39-41 and fns. 13, 14).

Captains Criswell and Starley sought to avoid this lawful BFOQ by bidding for Second Officer jobs under Western's collectively bargained seniority system. The System Board decision (A 84-94) held that they were not entitled to bid competitively for these jobs under that seniority system. The practical impact of the System Board decision was that the jobs were awarded to less senior younger pilots who, in *this* case, had greater bidding preference under the seniority system.

The pilots argue (Op. 11-13) that the arbitral interpretation of the collectively bargained seniority system does not implicate the seniority system defense of ADEA §4(f)(2) but only the "reasonable factors" defense. The Court of Appeals obviously did not accept this startling contention.

> "Western raised four defenses: first, that denial of the downbids could not give rise to an ADEA claim as a matter of law [*i.e.*], the seniority system exemption; . . . third, was justified by reasonable factors other than age . . . and finally, its policies were justified by business necessity [to obey the collectively bargained seniority system]. (A2)[1]
>
> "On this appeal Western argues (1) that the district court failed to accord proper deference to the System Board determination that the collective bargaining agreement did not permit the downbids attempted here, thereby depriving the airline of an absolute statutory exemption . . ." (A5)
>
> "Our ruling on this issue makes it unnecessary to reach Western's argument dealing with the bona fide seniority system exemption provided by 29 U.S.C. §623(f)(2). The question of the meaning of the collective bargaining agreement's provisions with regard to what forms of downbidding were permitted was in effect submitted to the jury." (A8, fn. 3)[2]

[1]In addressing these downbid issues the district court entitled the discussion "BND [Business Necessity Defense] Reasonable Factors Other Than Age" (A39) and thereafter analyzed those defenses as *explicitly* involving a seniority system. (A39-43)

Issue No. 3 in *ALPA v. TWA*, *cert. granted* No. 83-997 involves a conceptually similar question since the TWA seniority system, in practical effect, terminated the right to bid for Second Officer jobs after a Captain reached age 60, and the Second Circuit, in practical effect, required it to be rewritten to avoid age discrimination. The Court's recognition of the importance of this issue is further emphasized by the granting of ALPA's cross-petition for certiorari in the same case. No. 83-1325 (April 2, 1984)[3]

[2]In *Stone v. Western*, District Judge Tashima first gave collateral estoppel effect to what he regarded as the seniority system rationale implicit in his *Criswell* opinion (A95-98). However, he later adopted a revised rationale for avoiding the seniority system defense (544 F.Supp. 33, A 101-111) which rationale was later adopted by the 2d Circuit in *ALPA v. TWA*, 713 F.2d 940, 952, 953 *cert. granted* No. 83-997.

[3]ALPA's formulation of the issue emphasizes that the Second Circuit required seniority bidding rights to be modified in order to provide replacement jobs for Captains retired pursuant to a concededly lawful age 60 BFOQ. A slightly different rationale was implicitly applied in *Criswell* to justify the jury in ignoring the System Board decision and rescuing the pilots from the BFOQ "impact" of the Age 60 Rule. (A41 and fns. 13, 14).

II.

The Pilots Do Not Challenge Western's Contention That the Ninth Circuit Allocation of the Burden of Proof on the Reasonable Factors Defense Conflicts With the Rule in Other Circuits.

The Court of Appeals frankly confessed that in placing upon Western the burden of proving the reasonable factors defense, it was creating a conflict with the Fifth Circuit in *Marshall v. Westinghouse Electric Corp.* (A17). The pilots do not quarrel (Op. 13-15) with the conflict also created with *Loeb v. Textron* in the First Circuit and *Smith v. Univ. of North Carolina* in the 4th Cir. Rather the pilots merely argue the Ninth Circuit is correct and the other circuits wrong. Even if this were so, certiorari would have to be granted to resolve the conflict.

III.

Since Western's Petition Was Filed, the FAA Has Restated Its Rationale for Excluding Flight Engineers From the Age 60 Rule in a Manner Which Makes a BFOQ Clarification by This Court of Even Greater Urgency to the Entire Airline Industry.

Western's petition (pp. 18-21) noted that the Circuits, although formally acknowledging their debt to *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5 Cir., 1976), have nevertheless developed materially different BFOQ standards as to whether the employer must prove the absolute truth of the *Tamiami/Orzel* elements, or whether the employer must merely prove a rational basis for its judgment consisting of "reasonable cause, that is, a factual basis for believing" the truth of these *Tamiami/Orzel* BFOQ elements. Had the latter test been applied in *Criswell* the trial judge would have directed a verdict for Western. R. T. 1235-1236.

The pilots argue here (Op. 17-18) as they did at trial that the rationale of the Age 60 Rule is inapplicable to the job of flight engineer and that the failure of the FAA to prescribe an age limitation for flight engineers implies that an airline has no legitimate concern in imposing an employment restriction exceeding FAA standards. It would be a wonderful thing if the pilots were correct, but unfortunately the FAA's failure to act occurs in a context that leaves many airlines uneasy as to their own responsibilities with respect to aging flight engineers.

By a startling coincidence, ten days after Western's petition was filed herein (*i.e.*, on March 30, 1984) the FAA issued a restatement of its rationale for continuing the Age 60 Rule for Captains and First Officers but not applying the Rule to flight engineers. The restated rationale appears in 49 Fed.Reg. 14692 (April 12, 1984). The following excerpts from the FAA restatement illustrate why airlines believe they cannot ignore the age disablements of flight engineers.

> "There can be no real dispute that, with advancing age, the risks of suffering incapacitating medical events and of adverse phsychological, emotional, and physical changes rise. Although risks of incapacitation are present in younger people, overall they are so low as to be acceptable. At some point in the aging process, the risk becomes unacceptably high. The NIA Panel[4] attached no medical significance to age 60, or to any other specific age, as a mandatory retirement age. The Panel concluded that age-related health changes endanger aviation safety and further concluded that no medical or performance appraisal system can be identified that would single out pilots who would pose a hazard to safety. The Panel recommended retaining the

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[4]See Western's Petition herein, p. 16, fn. 8.

age 60 Rule. The FAA agrees. The conclusions reached by the NIA Panel and the supportive statements contained in the report point to a present inability to distinguish those pilots who, as a consequence of aging, present a threat to air safety from those who do not. Furthermore, public comments, especially those received from two experts from NASA and the Medical Director of a large aerospace firm, agree that there are currently no methods to obtain medical and performance data on older pilots which would provide significantly meaningful data to consider relaxing the age 60 rule. The inability to detect or predict with precision an individual's risk of sudden or subtle incapacitation, in the face of known age-related risks, counsels against relaxation of the rule." (49 Fed.Reg. 14695)

* * *

"Many commenters point out that the Federal Government has prohibited age discrimination in other areas and state that it is inconsistent with the Government's policy to allow it in this instance. The FAA is convinced that to maintain the highest standards of safety for Part 121 operations, as airlines are required to do, airline pilots should not be permitted to serve past age 60. This is based on the findings made by the FAA in 1959 that were supported by the NIA study and by a number of commenters. Those findings are that advanced age does indeed adversely affect the level of safety for Part 121 operations and that currently no medical or performance tests are available which afford a sufficiently reliable basis for predicting or precluding those adverse effects in any individual case." (49 Fed.Reg. 14693)

* * *

"Accordingly, as recommended by the NIA Panel, the present age limit for air carrier pilots in command and seconds in command is being retained. While sci-

ence and technology may at some future time develop accurate, validly selective tests which would allow a scientific study to be made to accurately determine whether the age 60 rule should be changed, safety cannot be compromised in the meantime for lack of such tests." (49 Fed.Reg. 14695)

* * *

"The FAA finds that, on those modern transport category airplanes which require three flight crewmembers, the flight engineers perform duties which contribute to the safe and efficient operation of the aircraft. The flight engineer and other flight crewmembers, regardless of age, must perform normal, abnormal, and emergency funtions with professionalism and timeliness to provide the highest degree of safety in the public interest." (49 Fed.Reg. 14694)

* * *

"After review of all the comments and the information which supports the age 60 rule for pilots, the FAA is not aware of any reason to believe that flight engineers are not subject to the same risks of diminishing health and performance to which pilots are subject." (49 Fed.Reg. 14693)

* * *

"The FAA has also determined not to propose an age beyond which flight engineers should not be permitted to serve. Available data is not sufficient in and of itself to support imposing a mandatory retirement age on flight engineers. The NTSB provided to the FAA air carrier accident/incident data in which the flight engineer was either a cause or a factor. The NTSB data for the years from 1962 through 1981 showed a total of 1,616 accidents/incidents, in which the flight engineer was cited as a cause in 13 cases and as a factor in 4 cases. It should not noted that, as FEIA states, the flight engineers involved in these accidents/

incidents were younger than 60 years of age." (49 Fed.Reg. 14695)

The use of flight engineers beyond age 60 was relatively infrequent until the 1978 amendments to the ADEA. Thus it is not clear how pertinent the 1962-1981 statistics are to measuring the potential risk of their increased use past age 60 in the post 1978 era.

Moreover, when an accident occurs on a large airliner, hundreds of lives are simultaneously placed at risk. Consequently, even over a period of twenty years, 17 accident/incidents implicating flight engineers define a potential risk to which a responsible airline should not shut its eyes. Some courts have declared this magnitude of risk as being the stuff out of which age BFOQs are justifiably constructed.

> "[The employer] need only demonstrate . . . a minimal increase of risk of harm for it is enough to show that elimination of the hiring [BFOQ] policy might jeopardize the life of one more person than might otherwise occur under the present hiring practice." *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859, 863 (7th Cir., 1974) *cert. den.* 419 U.S. 1122 (1974).
>
> "The employer must, of course, show a reasonable basis for its assessment of risk of injury/death. But it cannot be expected to establish this to a certainty, for certainty would require running the risk until a tragic accident would prove that the [employer's intended BFOQ] judgment was sound." *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 238 (5 Cir., 1976).

The duty of an airline to anticipate and address "risks resulting from low probability occurrences which could have extremely serious consequences" is further discussed in *Murnane v. American Airlines*, 667 F.2d 98, 101 (D.C. Cir., 1981) *cert. den.* 456 U.S. 915 (1982).

Similarly infrequent but potentially serious safety risks arising out of a flight attendant's passenger evacuation duties

have been held to justify a pregnancy BFOQ. *Harriss v. Pan American World Airways, Inc.*, 437 F.Supp. 413, 434 *aff'd in pertinent part* 649 F.2d 670 (9 Cir., 1980); *Burwell v. Eastern Airlines*, 633 F.2d 361 (4 Cir. en banc 1980), *cert. den.* 480 U.S. 965.

Given this state of the law, the above quoted restatement of the FAA rationale concerning its Age 60 Rule implies that individual airlines cannot simply ignore the risk of age related disablements in older flight engineers. However, for the present the FAA has merely granted the airlines some latitude in deciding whether to experiment with medical testing restrictions and/or impose an age restriction similar to that required for pilots. But certainly the FAA rationale for excluding flight engineers from a mandatory industry wide age 60 Rule does not imply that it is *not* appropriate for individual airlines to impose an age 60 BFOQ to control this conceded safety hazard. Western chose this latter option.

Indeed if, as the pilots contend, the failure of the FAA to apply the Age 60 Rule to flight engineers relieves airlines as a matter of law of any duty to further address the potential senility disablements of these important crewmembers, the entire airline industry will heave a heartfelt, albeit skeptical, sigh of relief. The opportunity to obtain such a ruling from this Court should persuade the pilots to support, rather than oppose, the granting herein of certiorari.

On the other hand, since the duties of a flight engineer are closely akin to those of pilots who *must* retire at age 60 pursuant to a lawful BFOQ, an appellate decision which prohibits an airline employer from voluntarily imposing such a closely related BFOQ establishes a precedent which virtually destroys the BFOQ defense in future ADEA actions. Only a decision of this Court can restore order and balance to this statute.

IV.

The Pretext Instruction Made a Self-Nullifying Mockery of the Jury's Consideration of the Business Necessity (BN) and BFOQ Public Safety Defenses.

The pilots correctly note (Op. 19) that the pretext concerns raised by Western's petition (pp. 23-25) are an extension of its earlier arguments that the *Criswell* courts, in their zeal to vindicate ADEA rights, gave short shift to the public concerns for airline safety implicit in the BFOQ.[5]

As emphasized in the petition (p. 20) the BFOQ jury instruction herein did not give the employer any discretionary leeway[6] but asked the jury to decide the BFOQ safety issue for itself as a matter of objective truth. The pretext instruction (A18) then directed the jury to disregard *its* own objective finding in favor of a BFOQ if *Western's* reasons for imposing the BFOQ were a "pretext" for age discrimination.

The inevitable perniciousness of the instruction arises from the fact that before even reaching consideration of the BFOQ, the jury had to have found that Western was in fact guilty of age discrimination. Otherwise the BFOQ is irrelevant. Western, by its safety arguments, was seeking to justify a finding not merely of overt age discrimination, but also of its inevitably lesser included element of "pretext". The pretext instruction thus *inevitably* made the entire BFOQ

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[5]The Business Necessity (BN) defense to disparate impact also involved safety (See A19-20) and was similarly compromised by the pretext instruction.

[6]The pilots (Op. p. 19, fn. 22) argue that the pretext instruction is merely equivalent to requiring the employer to have a good faith belief in the BFOQ. As shown below, the pretext instruction is quite different from a good faith instruction.

inquiry an exercise in self-nullifying futility.[7] It was logically equivalent to omitting the BFOQ instruction in its entirety. Had the trial court refused to give *any* instruction on the BFOQ, we do not think the Ninth Circuit would have regarded the omission as "harmless."

The Court of Appeal argued that the erroneous pretext instruction was *the* decisive element in the jury's rejection of the BFOQ, rather than an independent evaluation of the BFOQ safety elements per se (A22-23). However, if this is true, then it was incorrect for the Court of Appeals to premise denial of the motion for judgment n.o.v. (A13-14) upon an assumption that the jury weighed evidence which the pretext analysis suggests it was unnecessary for the jury to reach. Nor was it sound to reject errors in the Business Necessity instruction (A15) upon the premise that the BFOQ issue was properly decided by the jury. Sweeping system-wide injunctive relief (A27-38) affecting the safety of thousands, perhaps in the long run millions of Western's customers are thus being premised upon a hypothesized jury finding which, upon closer analysis, may have nothing whatever to do with airline safety. Public safety decisions demand more than such impossibly slippery logic.

V.

Conclusion.

The instant case presents critical issues affecting the entire airline industry, affecting other employers having public safety responsibilities, and affecting future administration

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[7]Remarkably, the Court of Appeals (A 22-23), after erroneously regarding safety rather than the Pilot Agreement as the "reasonable factor other than age", comes *mirabile dictu* to the correct conclusion that the jury would not have addressed the BFOQ without first finding age discrimination. It then proceeds to the mind-boggling conclusion that because the jury was thus persuaded to not address the BFOQ issue, the error was harmless.

of the ADEA itself. The issues herein closely complement, and partially overlap, those already recognized by the Court as significant in *ALPA v. TWA* (Nos. 83-997, 83-1325). Western therefore believes the petition for certiorari should be granted.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1984

WESTERN AIR LINES, INC., PETITIONER

v.

CHARLES G. CRISWELL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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28 pp

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QUESTIONS PRESENTED

1. Whether an arbitration award, which decided plaintiffs' contractual entitlement to transfers under a provision of the collective bargaining agreement, should be given conclusive effect in a suit to determine whether plaintiffs had been denied transfer opportunities due to their age in violation of their statutory rights under the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*

2. Whether, under the facts of this case, the employer was properly assigned the burden of proving its entitlement to the affirmative defense that the differences in transfer opportunities for older and younger workers were due to "reasonable factors other than age".

3. Whether the standards for proving a "bona fide occupational qualification" provide for adequate consideration of the safety needs of the airline industry.

4. Whether the jury instructions concerning pretext were harmless error.

TABLE OF CONTENTS

Page

Statement 1

Discussion 6

Conclusion 19

TABLE OF AUTHORITIES

Cases:

Air Line Pilots Ass'n v. *Trans World Airlines*, Inc., 713 F.2d 940, cert. granted, No. 83-997 (Feb. 27, 1984), cross petition granted, No. 83-1325 (Apr. 2, 1984) 10

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 7

Alloy International Co. v. *Hoover-NSK Bearing Co.*, 635 F.2d 1222 17

Andrews v. *Louisville & N. R.R.*, 406 U.S. 320 8

Arritt v. *Grisell*, 567 F.2d 1267 14

Barrentine v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728 7

Blackwell v. *Sun Electric Corp.*, 696 F.2d 1176 18

Corning Glass Works v. *Brennan*, 417 U.S. 188 12

Crosland v. *Charlotte Eye, Ear & Throat Hospital*, 686 F.2d 208 10

Dothard v. *Rawlinson*, 433 U.S. 321 ..... 11, 16

EEOC v. *City of St. Paul*, 671 F.2d 1162 11

Page

Cases—Continued:

EEOC v. *County of Santa Barbara*, 666 F.2d 373 15

EEOC v. *Goodyear Tire & Rubber Co.*, 22 Fair Empl. Prac. Cas. (BNA) 786 13

Griggs v. *Duke Power Co.*, 401 U.S. 424 11

Haring v. *CPC International, Inc.*, 644 F.2d 1234 18

Hodgson v. *First Federal Savings & Loan*, 455 F.2d 818 13

Houghton v. *McDonnell Douglas Corp.*, 553 F.2d 561, cert. denied, 434 U.S. 966 15

International Brotherhood of Teamsters v. *United States*, 431 U.S. 324 8

Johnson v. *American Airlines*, 32 Fair Empl. Prac. Cas. (BNA) 1236 10

Kelly v. *American Standard, Inc.*, 640 F.2d 974 18

Kouba v. *Allstate Insurance Co.*, 691 F.2d 873 ..... 12, 13

Laugesen v. *Anaconda Co.*, 510 F.2d 307 13

Levine v. *Fairleigh Dickinson University*, 646 F.2d 825 8

Loeb v. *Textron, Inc.*, 600 F.2d 1003 12

Marshall v. *Westinghouse Electric Corp.*, 576 F.2d 588 12

Massarsky v. *General Motors Corp.*, 706 F.2d 111 13

Page

Cases—Continued:

McDonald v. *City of West Branch*, No. 83-219 (Apr. 18, 1984) 7

McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 12

Morelock v. *NCR Corp.*, 586 2d 1096 cert. denied, 441 U.S. 906 8

Orzel v. *City of Wauwatosa Fire Dep't*, 697 F.2d 743, cert. denied, No. 83-205 (Nov. 28, 1983) 15, 16

Sexton v. *Beatrice Foods Co.*, 630 F.2d 478 11

Smallwood v. *United Air, Inc.*, 661 F.2d 303, cert. denied, 456 U.S. 1007 ..... 11, 16

Stewart v. *Smith*, 673 F.2d 485 15

Stone v. *Western Air Lines, Inc.*, 544 F. Supp. 33 ..... 5, 10

Texas Department of Coummunity Affairs v. *Burdine*, 450 U.S. 248 12-13

Tuohy v. *Ford Motor Co.*, 675 F.2d 842 ..... 14, 15

TWA v. *Thurston*, cert. granted, No. 83-997 (Feb. 27, 1984), cross petition granted, No. 83-1325 (Apr. 2, 1984) 6-7

United States v. *Park*, 421 U.S. 658 17

Usery v. *Tamiami Trails Tours, Inc.*, 531 F.2 224 ..... 3, 13, 15

Page

Statutes and regulations:

Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* .....

§ 4(f), 29 U.S.C. 623(f) 10-11

§ 4(f)(1), 29 U.S.C. 623(f)(1) 2, 12

§ 4(f)(2), 29 U.S.C. 623(f)(2) 2, 5, 6, 8, 10, 11

Civil Rights Act of 1964, Tit, VIII. 42 U.S.C. (& Supp. V) 2000 *et seq.* 12

Equal Pay Act of 1963, 29 U.S.C 206(d)(1) 11-12

45 U.S.C. 184 4

14 C.F.R. 121.383(c) 2

29 C.F.R.:

Section 860.103 (33 Fed. Reg. 9173 (1963)) 11, 13

Section 1625.6 ..... 15, 17

Section 1625.7(e) 11

Exec. Order No. 12144, 44 Fed. Reg. 37193 (1979) 11

49 Fed. Reg. 14692 (1984) 2

Reorg. Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978) 11

Page

Miscellaneous:

H.R. Rep. 805, 90th Cong., 1st Sess. (1967) 16, 17

Report of the Secretary of Labor *The Older American Worker* (1965) 16

In the Supreme Court of the United States

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No. 83-1545

WESTERN AIR LINES, INC., PETITIONER

v.

CHARLES G. CRISWELL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner refuses to employ any second officers[1] beyond age 60. This policy requires the involuntary retirement of incumbent second officers at age 60, and also requires senior captains and copilots to retire on their sixtieth birthdays even though there are vacant second officer

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[1]Second officers (also called flight engineers under Federal Aviation Administration (FAA) regulations) are the third ranking crew members in the cockpit of certain of petitioner's aircraft (Pet. App. A2). The second officer monitors and adjusts a number of the mechanical systems on the plane, but is not involved in the flying of the plane (*id.* at A37-A38).

positions (Pet. App. A2-A3, A32-A33).[2] Respondents, who are two captains and a second officer involuntarily retired at age 60, brought this suit challenging petitioner's "age 60 policy" as a violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*

2. Petitioner defended its mandatory retirement policy by arguing that age less than 60 is a bona fide occupational qualification (BFOQ) for the job of flight engineer (Pet. App. A34). Alternatively, petitioner claimed that its refusal to permit captains and copilots to transfer to the position of second officer is based on reasonable factors other than age (RFOA) (*ibid.*).[3] Specifically, petitioner claimed that a facially neutral policy against downbidding resulted in the denial of such transfer requests (Pet. App. A39). Upon appeal to the Ninth Circuit, petitioner for the first time also claimed that its actions were in conformity with a bona fide seniority system and thus protected under Section 4(f)(2) of the ADEA, 29 U.S.C. 623 (f)(2).[4]

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[2]Under FAA regulations, crew members cannot serve as either captains or copilots past age 60 (14 C.F.R. 121.383(c)). Neither this nor any other FAA regulation restricts the employment of flight engineers after age 60 (Pet. App. A2, A35). The FAA recently rejected a proposal to extend its "age 60 rule" to flight engineers, basing its decision on the significantly less critical nature of the job. 49 Fed. Reg. 14692 (1984).

[3]The statutory defenses of BFOQ and RFOA are contained in Section 4(f)(1) of the ADEA, 29 U.S.C. 623(f)(1), which states:

> It shall not be unlawful for an employer, employment agency, or labor organization —
>
> (1) to take any action otherwise prohibited under subsections (a), (b), (c) or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age[.]

[4]Section 4(f)(2) of the ADEA, 29 U.S.C. 623(f)(2), provides that it is not unlawful for an employer:

3. After a fifteen-day trial, the jury returned a verdict in favor of all three respondents (Pet. App. A31-A32). The court of appeals affirmed, holding that the jury had been properly instructed and the verdict was supported by substantial evidence.

The court of appeals rejected petitioner's argument that the jury instructions concerning the BFOQ defense did not ensure adequate consideration of its safety obligations. The court noted that the instructions conformed to the BFQQ standard first enunicated in *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976), and uniformly applied in the Ninth and other circuits (Pet. App. A10). The court held that this standard, as well as the express language of the ADEA, requires proof that any age limitation is "reasonably necessary" to the essence of the employer's business, and not merely that the employer has a rational basis for it (*id.* at A11). Rejecting petitioner's claim that the district court was required to instruct the jury that petitioner had a duty to operate its business with the highest degree of safety, the court of appeals concluded that these precise words were not necessary where the district court gave ample emphasis to the importance of safety in other ways (Pet. App. A12). It was sufficient that the jury had been told that the essence of petitioner's business is the safe transportation of passengers, and that second officers have to be able to perform their jobs both safely and efficiently (*ibid.*).

> to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that * * * no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual [between ages 40 and 70] because of the age of such individual[.]

In upholding the factual finding of the jury, the court relied heavily on evidence that the flight engineer position is not critical to safety. The court noted that pilots under age 60 who become medically incapacitated to serve as captains or copilots are permitted to downbid to the position of second officer (Pet. App. A14, A38). The court also pointed to evidence that there had never been an accident caused by the disability of a second officer, and that the other crew members are fully trained to perform the flight engineer's duties in the event of his incapacity (*ibid.*). The court noted that plaintiffs had presented expert testimony showing that current diagnostic techniques are capable of screening out those individuals over age 60 who are physically unfit to perform as flight engineers (Pet. App. A14).

The court of appeals also rejected petitioner's contention that the district court should have given conclusive weight to an arbitration award upholding petitioner's rejection of respondent captains' bids to fill second officer positions.[5]

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[5]The award, rendered by a system board of adjustment composed of a neutral Chairman, two of petitioner's representatives and two representatives of the pilots' union (Pet. App. A3, A90-A91; see 45 U.S.C. 184), determined that petitioner's denial of respondents' bids did not violate the provision of the collective bargaining agreement concerning "wide-body downbids" (Pet. App. A84-A94). The board concluded that although the language of the contract provision appeared to permit any captain to downbid on the basis of seniority to any second officer vacancy in wide-body planes, the parties had intended only to permit captains on narrow-body planes to transfer to wide-body equipment (Pet. App. A86-A88). The board described the contract as being opposed in principle to downbidding, and permitting it only in "rare and carefully defined circumstances" (Pet. App. A88). The board concluded that the contracting parties had not meant to recognize an exception where sought by a captain "for the obvious purpose of evading the application of [the] agreed mandatory retirement plan" (Pet. App. A89). In dissent, one board member stated that the express language of the provision permitting the requested downbid was fully consistent with the seniority system, contained in the collective bargaining agreement, which established the right to "freedom of choice in bidding permanent vacancies" in accordance with a pilot's seniority (Pet. App. A93).

Relying on decisions of this Court, the court of appeals held that a decision of an arbitrator, who is concerned only with interpreting the collective barganing agreement and enforcing the intent of the parties, cannot be dispositive of plaintiffs' statutory claims under the ADEA (Pet. App. A7).[6] The court held that sufficient weight had been accorded this decision by admitting it into evidence, permitting the trier of fact to give it such weight as it considered appropriate (*id.* at A41 n.14), and instructing the jury that compliance with the terms of a collective bargaining agreement could be a reasonable factor other than age (*id.* at A8). The court found it unnecessary to reach petitioner's arguments concerning the bona fide seniority system defense under Section 4(f)(2), because it concluded that "the question of the meaning of the collective bargaining agreement's provisions with regard to what forms of downbidding were permitted was in effect submitted to the jury" (Pet. App. A8 n.3)[7]

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[6]The court observed that the evidence before the arbitration board had been "minuscule" with regard to the degree and kind of downbidding permitted by petitioner (Pet. App. A7).

[7]The Section 4(f)(2) defense was addressed by the district court in *Stone* v. *Western Air Lines Inc.*, 544 F. Supp. 33 (C.D. Cal. 1982). In *Stone*, petitioner had argued that plaintiffs' mandatory retirements were justified by the absence of second officer vacancies at the time they reached age 60. Noting that "age 60 captains seeking to downbid are the only individuals who are severed from the company rather than allowed to maintain their employee status until such time as a vacancy occurs" (Pet. App. A106), the court rejected Western's defense that its action was the result of a "*bona fide* seniority system." The court concluded: "it is apparent that plaintiffs' alleged injury stems not from the application of particular seniority rules, but rather from a policy, *nowhere embodied in the Pilot Agreement*, which equates retirement as a captain at age 60 with a complete severance from the company" (Pet. App. A107 (emphasis in original)). Although the *Stone* decision was consolidated on appeal with the instant decision, this portion of the *Stone* decision was not part of the appeal to the Ninth Circuit, and is accordingly not before this Court on this petition.

The court concluded that the jury's verdict, finding discrimination against captains seeking to downbid, was supported by "a great deal of evidence tending to show that Western did not administer its downbidding system in an age-neutral fashion, but rather that it routinely granted exceptions for younger pilots" (Pet. App. A8). As to petitioner's remaining complaints about the instructions, the court held that the burden of proving reasonable factors other than age had properly been placed on the petitioner and that the pretext instruction, although incorrect, was harmless error (Pet. App. A17, A19-A23).

DISCUSSION

1. Petitioner argues that because an arbitration board held that its rejection of respondent pilots' bids for second officer positions did not violate the collective bargaining agreement, respondents' statutory claim of age discrimination is barred.[8] The arbitration award was introduced into evidence for consideration by the jury; however, relying on prior decisions of this Court, the court below properly refused to give that decision conclusive weight on any of the issues in this case. Since this Court has already fully addressed the weight to be accorded to arbitration decisions in discrimination cases, and petitioner has identified no conflict in the circuits on this issue, review by this Court is not warranted.[9]

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[8]The arbitration award would not, in any event, relate to the claim of respondent Ron, the career second officer.

[9]Petitioner asserts that its petition raises issues similar to those involved in *TWA* v. *Thurston*, cert. granted, No. 83-997 (Feb. 27, 1984), cross petition granted, No. 83-1325 (Apr. 2, 1984). That case, which is scheduled for oral argument on October 9, 1984, involves no question of the weight to be accorded arbitration decisions in ADEA cases. Moreover, neither TWA's petition for certiorari nor ALPA's cross-petition presents any question concerning the proper interpretation of the Section 4(f)(2) bona fide seniority system defense, although that subject is discussed in the briefs in that case. The other issues raised

Respondent pilots' claim is that they were denied the opportunity to transfer to second officer positions when they were displaced from their pilot jobs by the FAA age 60 rule, whereas younger pilots were permitted to exercise such transfer rights when removed from their jobs for non-age-related reasons.[10] They therefore asserted that they had been discriminated against because of their age, in violation of the ADEA. As this Court has repeatedly recognized, such claims of violations of federal statutory rights must be decided by the courts, which are to apply the standards mandated by Congress; an arbitration award, which merely enforces contract rights, cannot be given conclusive weight. *McDonald* v. *City of West Branch*, No. 83-219 (Apr. 18, 1984); *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974).

As petitioner notes, deference to an arbitration award will generally be appropriate where the plaintiff is attempting to enforce rights that stem from the collective bargaining agreement. See *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. at 734 n.19 (where statute adopts

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~~9 issues raised~~ by the present petition are not involved in *Thurston*. We therefore do not believe it necessary for the Court to hold the present petition pending its decision in *Thurston*.

[10]The evidence presented at trial showed that between 1972 and 1979, petitioner permitted 400 transfers to lower grade positions in a wide variety of circumstances (Pet. App. A42). In addition to the wide-body downbid provision discussed in the system board's arbitration award (see note 5, *supra*), pilots under age 60 were permitted to transfer to second officer positions when they were unable to meet the medical standards for a pilot position but could still meet the lesser standards for second officers, or when displaced due to a reduction in force (*ibid.*). Moreover, even though not sanctioned by any specific provision of the contract, downgrades were permitted for disciplinary reasons or to accommodate a personal hardship (Pet. App. A42-A43). The district court observed that it was only in the case of pilots approaching age 60 that petitioner consistently denied downbids (*ibid.*).

standards provided in collective bargaining agreement, Court assumes that deference to arbitral construction of contract would be appropriate); *Andrews* v. *Louisville & N. R.R.*, 406 U.S. 320 (1972) (where employee's claim for continued employment is based on collective bargaining agreement, court should defer to grievance procedure). This line of cases is not helpful to petitioner, however, since respondents' claim does not depend on whether the collective bargaining agreement guaranteed them a right to downbid, but rather on whether petitioner's practices as a whole (whether or not required by the agreement) treated age 60 pilots differently than younger pilots. That discriminatory practices are permitted by, or even enshrined in, a collective bargaining agreement is no defense to a charge of age discrimination. *Levine* v. *Fairleigh Dickinson University*, 646 F.2d 825, 832 (3d Cir. 1981).[11]

In any event, the issue decided by the arbitration board was different from any issue submitted to the jury. The system board considered only the issue of whether the complaining pilots were entitled to downbids under the wide-body downbid provision (see note 5, *supra*).[12] This was not, however, the only avenue available for transfers to the second officer position. Transfers were available under other provisions of the collective bargaining agreement,

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[11]This is so even where an employer asserts a defense under Section 4(f)(2) based on alleged compliance with a "bona fide seniority system." A seniority system is "bona fide" only if it is facially neutral and accords like treatment to older and younger workers. *Morelock* v. *NCR Corp.*, 586 F.2d 1096, 1106 (6th Cir. 1978), cert. denied, 441 U.S. 906 (1979). Cf. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 353-356 (1977).

[12]Because the arbitration board specifically states that the basis of its decision is to prevent evasion of petitioner's mandatory retirement policy, even its decision on that narrow issue cannot be accorded substantial deference, as it implements a policy unlawful under the Act.

and had even been permitted by petitioner where no particular provision of the contract was applicable (Pet. App. A42-A43). Thus, even accepting the finding of the system board, a jury could still find that petitioner had exercised its discretion to make transfers in a discriminatory manner.[13] The arbitration award simply does not answer the question whether petitioner routinely allowed younger pilots who were displaced from their pilot jobs to use their seniority to secure second officer positions, but unlawfully required age 60 pilots to retire when similarly displaced from their pilot positions. At trial, petitioner asserted that its refusal to permit respondent pilots to downbid reflected a practice based on "reasonable factors other than age." The arbitration award could not be determinative of this defense, since, as we have shown, the board simply did not consider whether age was a factor in petitioner's policies.

The court of appeals did not address petitioner's related claim of entitlement to a bona fide seniority system defense, raised for the first time on appeal, because it determined that this issue had in effect been submitted to and decided by the jury (Pet. App. A8 n.3). This was proper in the circumstances of this case. Petitioner's "seniority system" defense was essentially a reformulation of its RFOA ("reasonable factors other than age") defense: in both, the claim was that the refusal to transfer respondent pilots was due to age-neutral provisions of its collective bargaining agreement, and was not based on respondents' age. This claim

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[13]The arbitration award contained general language that downbidding was disfavored and only permitted in "rare and carefully described circumstances." Respondents and the court disagreed with this characterization of the extent of downbids — there was apparently no dispute that 400 downbids had occurred — but the critical point is that even the board recognized that there were exceptions permitting downbids. Respondents' claim is that these exceptions were defined or administered in an age-biased manner. The arbitration award does not address this issue.

was submitted to the jury, which was instructed that complying with a neutral collective bargaining agreement is a defense, and that the issue of fact for its determination, based on all the evidence, was whether petitioner's actions were due to such an agreement or were based on age (Tr. 2628). The jury's verdict thus reflected its conclusion that age was a determining factor in the denial of transfers to respondents. That factual finding is fatal not only to petitioner's RFOA defense, but also to its "seniority system" defense. Accordingly, this is an inappropriate case in which to consider more general contentions concerning the proper interpretation of Section 4(f)(2) of the ADEA.[14]

2. The court of appeals correctly held that petitioner had the burden of proving that its employment practices were the result of "reasonable factors other than age" (Pet. App. A15-A17). This "RFOA" defense is based on one of the specific statutory exceptions, contained in Section 4(f) of

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[14]The lower courts that have addressed this defense have uniformly concluded that it is unavailable as a matter of law in a case such as this, where senior pilots are merely attempting to exercise their seniority rights in the same fashion that younger pilots do. See *Air Line Pilots Ass'n* v. *Trans World Airlines, Inc.*, 713 F.2d 940, 953 (2d Cir. 1983), cert. granted, No. 83-997 (Feb. 27, 1984), cross petition granted, No. 83-1325 (Apr. 2, 1984); *Johnson* v. *American Airlines*, 32 Fair Empl. Prac. Cas. (BNA) 1236 (N.D. Tex. 1983). Nor is the defense available, where, as here, plaintiffs' severance from the company results, not from any provision of the seniority system, but instead from a separate policy requiring mandatory retirement when age 60 crewmembers cease being eligible to serve as pilots. *Air Line Pilots Ass'n* v. *Trans World Airlines, Inc.*, 713 F.2d at 953; *Stone* v. *Western Air Lines, Inc.*, 544 F. Supp. 33, 37-38 (C.D. Cal. 1982) (see note 7, *supra*). Finally, even accepting petitioner's contention that it is the seniority system that is responsible for the mandatory retirement of age 60 pilots, a bona fide seniority system defense would no longer be available, because Congress specifically amended the ADEA in 1978 to make clear that a bona fide seniority system cannot require or permit mandatory retirement. *Crosland* v. *Charlotte Eye, Ear & Throat Hospital*, 686 F.2d 208, 213 (4th Cir. 1982).

the ADEA, 29 U.S.C. 623 (f), to the otherwise broad prohibition of employment discrimination based upon age. As exceptions to a remedial statute, the Section 4(f) defenses have been narrowly construed, and the burden of proving their applicability has been placed upon the employer. See *EEOC* v. *City of St. Paul*, 671 F.2d 1162, 1166 (8th Cir. 1982) (employer has burden of proving BFOQ defense under Section 4(f)(1) of ADEA); *Smallwood* v. *United Air Lines Inc.*, 661 F.2d 303, 307 (4th Cir. 1981), cert. denied, 456 U.S. 1007 (1982) (same); *Sexton* v. *Beatrice Foods Co.*, 630 F.2d 478, 486 (7th Cir. 1980) (employer has burden of proving bona fide employee benefit plan defense under Section 4(f)(2) of the ADEA).

In treating the RFOA defense similarly to other affirmative defenses under Section 4(f), the court of appeals acted in accordance with the EEOC's interpretations of the ADEA, which require an employer to prove the existence of any reasonable factor other than age alleged to be responsible for a differentiation between older and younger workers. 29 C.F.R. 1625.7(e). See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971) (interpretations of agency charged with enforcing the Act entitled to great weight).[15] Moreover, this Court has held that, under an almost identical exception in the Equal Pay Act of 1963, 29 U.S.C.

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[15]Authority for enforcing the ADEA initially resided in the Department of Labor and was transferred to the EEOC in July 1979. Reorg. Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978); Exec. Order No. 12144, 44 Fed. Reg. 37193 (1979). EEOC's current position is in accord with that taken by the Department of Labor since 1968. 29 C.F.R. 860.103(e), 33 Fed. Reg. 9173 (1968) ("burden of proof in establishing the applicability of the [reasonable factors other than age] exception will rest upon the employer, employment agency or labor union which seeks to invoke it"). Where an administrative interpretation is promulgated soon after the enactment of the statute and thereafter remains the consistent position of the agency, it is particulary worthy of deference. *Dothard* v. *Rawlinson*, 433 U.S. 321, 334 n.19 (1977).

206(d)(1), the employer bears the burden of proving that a pay differential was based on a "factor other than sex." *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 196-197 (1974); see also *Kouba* v. *Allstate Insurance Co.*, 691 F.2d 873 (9th Cir. 1982).

Contrary to petitioner's argument, the holding of the court of appeals on this issue is not in conflict with that of any other circuit. The cases relied upon by petitioner involve individual claims of discrimination, where the employer merely denies that a particular personnel action was taken for a discriminatory reason. *Loeb* v. *Textron Inc.*, 600 F.2d 1003 (1st Cir. 1979); *Marshall* v. *Westinghouse Electric Corp.* 576 F.2d 588 (5th Cir. 1978). In such cases, the courts have adopted the method used under Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e *et seq.*, for determining whether discriminatory animus played a role in an employment decision. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981). Accordingly, they have held that, following the fairly minimal showing required for plaintiff to create an initial inference of discrimination, the employer is obligated only to articulate a legitimate nondiscriminatory reason for its action,[16] while the ultimate burden of proving intentional discrimination remains always with the plaintiff. *Texas Department of Community Affairs* v. *Burdine*, *supra*.

Courts have properly distinguished this simple "denial" defense from situations where a RFOA is asserted after there has been a showing of disparate treatment between

[16] *Loeb* and *Westinghouse* refer to this as a "reasonable factors other than age" defense under Section 4(f)(1) of the ADEA. Whether that characterization is appropriate is not presented by this case, in which the RFOA defense is asserted to justify, rather than to deny, disparate treatment.

employees of different ages and the employer asserts that such differences are permissible because they are due to RFOA, that is, specific reasonable criteria which are uniformly applied to all employees. See *Massarsky* v. *General Motors Corp.*, 706 F.2d 111, 117 n.11, 123 n.20 (3d Cir. 1983); *Laugesen* v. *Anaconda Co.*, 510 F.2d 307, 315 (6th Cir. 1975); *EEOC* v. *Goodyear Tire & Rubber Co.*, 22 Fair Empl. Prac. Cas. (BNA) 786, 787 (W.D. Tenn. 1980).[17] This is clearly an affirmative defense; it becomes relevant only after the plaintiff has shown an age-related disparity. In such circumstances, it is fully appropriate to require that the employer prove that this observed difference in treatment is actually due to a non-age factor. See *Hodgson* v. *First Federal Savings & Loan Ass'n*, 455 F.2d 818 (5th Cir. 1972) (once government establishes pattern of rejecting older applicants as tellers, Bank has burden of showing that this differentiation due to factor other than age).

The present case similarly involves an affirmative RFOA defense, rather than a mere "denial" defense. Here, respondents did more than simply create an inference of discrimination by showing that they were discharged from jobs for which they were qualified. They showed a classwide pattern of requiring all age 60 pilots to retire, rather than permitting them to preserve their employment by transferring to lower level positions as is done with younger

[17] Examples of possible reasonable factors other than age are physical examinations, educational requirements, or quality or quantity standards. See *Laugesen* v. *Anaconda*, 510 F.2d at 315; *EEOC* v. *Goodyear Tire & Rubber Co.*, 22 Fair Empl. Prac. Cas. (BNA) at 787; former regulations of Department of Labor, 29 C.F.R. 860.103(f) (1978). Cf. *Kouba* v. *Allstate Insurance Co.*, *supra* (factor closely associated with sex must have reasonable business justification to be a "factor other than sex").

displaced workers.[18] Petitioner attempted to prove that this observed difference in treatment between older and younger workers was actually due to the uniformly applied terms of its collective bargaining agreement. It was thus proper for the courts below to require petitioner to prove the existence of the alleged uniform no downbidding policy.

3. The standards for a BFOQ defense adopted by the Ninth Circuit are fully consistent with those used by every other court of appeals that has considered the issue. These standards ensure that full consideration will be given to the safety needs of the airline industry.

In almost identical language, every court of appeals that has addressed the BFOQ defense has required the employer to prove:

> (1) that the BFOQ which it invokes is reasonably necessary to the essence of [the employer's business;] and
>
> (2) that the employer has * * * a factual basis for believing that all or substantially all persons [above the age limit] would be unable to perform safely and efficiently the duties of the job involved or that it is impossible or impractical to [determine fitness on an] individualized basis.

Arritt v. *Grisell*, 567 F.2d 1267, 1271 (4th Cir. 1977); *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976); *Tuohy* v. *Ford Motor Co.*, 675 F.2d 842 (6th Cir. 1982);

[18]Contrary to its assertions (Pet. 15), petitioner was never required to prove the absence of discrimination. The burden of proving discriminatory treatment was placed firmly on the plaintiffs (Tr. 2621) and the jury was specifically instructed that it was not petitioner's burden "to prove a contrary freedom from illegal motivation" (Tr. 2630).

Orzel v. *City of Wauwatosa Fire Dep't*, 697 F.2d 743 (7th Cir. 1983), cert. denied, No. 83-205 (Nov. 28, 1983); *Houghton* v. *McDonnell Douglas Corp.*, 553 F.2d 561 (8th Cir.), cert. denied, 434 U.S. 966 (1977); *EEOC* v. *County of Santa Barbara*, 666 F.2d 373 (9th Cir. 1982); *Stewart* v. *Smith*, 673 F.2d 485, 491 n.26 (D.C. Cir. 1982). See also, EEOC Interpretations, 29 C.F.R. 1625.6.

A careful consideration of the demands of public safety is built into this standard. The essence of a public carrier's business has invariably been defined as the safe transportation of passengers. See *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d at 235; *Tuohy* v. *Ford Motor Co.*, 675 F.2d at 844. In addition, an employer is entitled to require safe job performance and can use an age limitation where ability to perform safely cannot be ascertained on an individualized basis (*ibid.*). Contrary to petitioner's assertions, the employer is not required to prove either of these elements to an absolute certainty. Rather, an employer is required to show only that its use of age is "reasonably necessary" to safe transportation, and that there is a factual basis for its claim that individualized testing is not possible or practical.[19] Petitioner urges this Court to overrule the unanimous interpretation of the courts of appeals and substitute a standard that mandates acceptance of a BFOQ defense whenever an employer has some rational basis for its age

[19]This is precisely the standard enunciated by the Ninth Circuit in this case (Pet. App. A10-A13). The district court's jury instructions also followed this standard and only required "reasonable" necessity (Tr. 2626). Although the district court did not use the precise words "factual basis" in stating the second prong of the BFOQ, the thrust of the instructions was the same: the jury was asked to evaluate whether the employer presented evidence showing that individualized treatment was not possible (Tr. 2627). This is the only way in which an employer can prove a factual basis for its policy. No absolute certainty was required (Tr. 2618). The court of appeals therefore correctly concluded that the instructions adequately advised the jury on the standards for the BFOQ defense.

limitation, even if the preponderance of the evidence at trial fails to support the need for such a policy. Adopting such a standard would undermine the policies of the ADEA while doing nothing to increase public safety.

The ADEA was intended to eliminate stereotypical thinking about aging and to ensure that employment decisions are based on the actual abilities of older workers. Report of the Secretary of Labor, *The Older American Worker* 2, 7, 8 (1965); H.R. Rep. 805, 90th Cong., lst Sess. 1-2 (1967). While recognizing that employers must be able to use age limitations where they are "reasonably necessary" to the essential business of the employer, Congress intended this exception to be given narrow scope so that it would not undercut the essential purposes of the Act. *Orzel* v. *City of Wauwatosa Fire Dep't., supra; Smallwood* v. *United Air Lines, Inc., supra;* cf. *Dothard* v. *Rawlinson,* 433 U.S. 321 (1977) (Title VII). The BFOQ standard fashioned by the courts of appeals balances these objectives in a harmonious fashion: BFOQ's are upheld wherever an employer presents adequate proof that they are "reasonably necessary" and its objectives cannot be met by individualized assessment of ability.

Petitioner insists that an employer should be permitted to continue using age limitations if it had a good faith belief in the need for such a limitation, even though it could not produce sufficient evidence to convince the trier of fact of this need. Petitioner's proposed "rational basis in fact" standard would mean that an employer would need only to present some supporting evidence for its rule in order to prevail, even if that evidence were entirely overborne by plaintiffs' evidence. Such a subjective standard would be entirely inconsistent with the congressional intent that older workers not be eliminated from the work place due to unsupported fears about their abilities. Under that standard, the Act would be ineffective to prevent the needless

retirement of experienced employees when the evidence demonstrates that their ability to perform their particular jobs safely can be evaluated on an individualized basis.

Petitioner criticizes the approach taken by the courts of appeals because it can yield different results in different cases. Congress could have prevented this if it had chosen to enact a schedule of appropriate age limitations for different occupations. Instead, it decided to leave the determination of BFOQ's to the individual employer, subject to review by the courts. H.R. Rep. 805, 90th Cong., lst Sess. 7 (1967). This approach gives the employer considerable discretion, requiring only that it have adequate evidence to back up any choice it makes. An employer who performs a thoughtful study before adopting an age limitation will be in a good position if its policy is challenged in court. See 29 C.F.R. 1625.6. Petitioner never performed such a study, either when it adopted an age 60 limitation for flight engineers or when the 1978 ADEA amendments eliminated the pension plan as a justification for this policy.

4. Although petitioner agrees with the court of appeals' ruling that a pretext instruction is erroneous in a BFOQ case, it argues that the court should not have found this error to be harmless. Whether a particular instruction is prejudicial depends on a careful review of the evidence and argument presented to the jury, and the instructions taken as a whole. *United States* v. *Park,* 421 U.S. 658, 674-676 (1975); *Alloy International Co.* v. *Hoover-NSK Bearing Co.,* 635 F.2d 1222, 1226 (7th Cir. 1980). The court of appeals exercised its discretion on this question in an appropriate manner. No special circumstances are presented which necessitate further review by this Court.

A charge to the jury need not be a model statement of the law to be upheld. Even where it contains errors, inaccuracies, or ambiguities, it may be upheld if, taken as a whole,

the charge directs the jury's attention to the correct legal issues and standards. *Blackwell* v. *Sun Electric Corp.*, 696 F.2d 1176 (6th Cir. 1983); *Haring* v. *CPC International, Inc.*, 664 F.2d 1234 (5th Cir. 1981); *Kelly* v. *American Standard, Inc.*, 640 F.2d 974 (9th Cir. 1981).

Here, the jury was told that it is not unlawful for an employer to take action otherwise prohibited by the ADEA where age is a BFOQ (Tr. 2619). The court gave thorough instructions concerning the requirements for a BFOQ defense and emphasized that "[i]f defendant establishes such a BFOQ by preponderance of the evidence, then its age discrimination is lawful under the ADEA" (Tr. 2627). Thus, contrary to petitioner's suggestion, the jury clearly knew that if it found that an age 60 limitation was reasonably necessary to safe air transportation and that individualized testing was not practicable then it must find for petitioner.

The jury was also given a general instruction, applicable to all of petitioner's defenses, that it could find for plaintiffs if they proved that petitioner's asserted reasons were a mere pretext or cover-up for age discrimination (Tr. 2630). The court of appeals concluded that, based on the specific facts of this case, this instruction would merely have reinforced the BFOQ instruction by ensuring that the jury considered plaintiffs' rebuttal evidence concerning the BFOQ issue as well as defendant's evidence (Pet. App. A22-A23). The only evidence of "pretext" referred to by either the court or petitioner is plaintiffs' proof that, although petitioner asserted that all crew members must be held to the same medical standards, petitioner in fact treated the flight engineer position as less critical and permitted pilots who could not meet the medical requirements of the pilot classification to downbid to flight engineer. This type of evidence, although it casts some doubt on the genuineness of petitioner's contentions, is also directly relevant to the main issue in

the BFOQ case: whether the age limitation imposed is reasonably necessary for safety. That petitioner and the FAA treated the flight engineer position as a lower risk position, in which those recovering from heart attacks and other ailments could be accommodated, is some evidence that the age 60 rule was not needed, and that individual assessments of fitness for this job could be made. Thus, there was no evidence before the jury suggesting that some hidden animus toward older workers contaminated an otherwise legitimate BFOQ defense. Instead the "pretext" evidence was nothing more than evidence tending to rebut the existence of a factual basis for petitioner's BFOQ defense. On this record, the court of appeals was correct in finding that the pretext instruction did not divert the jury from proper consideration of the BFOQ defense.

CONCLUSION

The petition for a writ of certiorari should be denied.[20]

Respectfully submitted.

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Equal Employment Opportunity Commission

AUGUST 1984

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[20]See note 9, *supra*.

DOJ-1984-08

AMICUS CURIAE

BRIEF

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No. 83-1545

IN THE

Supreme Court of the United States

WESTERN AIR LINES, INC.,
Petitioner,
v.
CHARLES G. CRUTWELL, ALBERT RON
and RULON H. STARLEY,
Respondents.

WESTERN AIR LINES, INC.,
Petitioner,
v.
WESTCOT B. STONE, III, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

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22 pp

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	2
SUMMARY OF ARGUMENT	3
ARGUMENT	3
SECTION 4(f)(1) OF THE ADEA EXEMPTS A COMMON CARRIER'S AGE LIMIT WHERE THE ELIMINATION OF THAT LIMIT MAY INCREASE THE RISK OF INJURY TO ITS PASSENGERS	3
A. To Establish a BFOQ, an Employer Must Prove that It Has a Factual Basis for Its Position that the Risk of Injury from Age-Related Inadequate Performance Cannot be Eliminated by Practical Individualized Assessment Procedures	5
B. The Jury Instructions Were Erroneous and Prejudicial	12
CONCLUSION	14

TABLE OF AUTHORITIES

CASES — Page

Criswell v. *Western Airlines, Inc.*, 709 F.2d 544 (9th Cir. 1983) — 4
EEOC v. *County of Santa Barbara*, 666 F.2d 373 (9th Cir. 1982) — 8
EEOC v. *Missouri State Highway Patrol*, 555 F. Supp. 97 (W.D. Mo. 1982) — 4
Gathercole v. *Global Associates*, 727 F.2d 1485 (9th Cir. 1984) — 4, 11
Gray v. *FAA*, 594 F.2d 793 (10th Cir. 1979) — 11
Harriss v. *Pan American World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980) — 6
Hodgson v. *Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975) — 8
Houghton v. *McDonnell Douglas Corp.*, 553 F.2d 561 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977) — 4
Johnson v. *Mayor and City Council of Baltimore*, 731 F.2d 209 (4th Cir. 1984) — 4
Keating v. *FAA*, 610 F.2d 611 (9th Cir. 1979) — 10
Mahoney v. *Trabucco*, 738 F.2d 35 (1st Cir. 1984) — 4
McMahon v. *Barclay*, 510 F. Supp. 1114 (S.D.N.Y. 1981) — 4
Monroe v. *United Air Lines, Inc.*, 736 F.2d 394 (7th Cir. 1984) — 4
Murnane v. *American Airlines, Inc.*, 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982) — 4, 8
Orzel v. *City of Wauwatosa Fire Dept.*, 697 F.2d 743 (7th Cir.), *cert. denied*, —— U.S. ——, 104 S.Ct. 484 (1983) — 8
Rombough v. *FAA*, 594 F.2d 893 (2d Cir. 1979) — 10
Smallwood v. *United Air Lines, Inc.*, 661 F.2d 303 (4th Cir. 1981) — 4
Starr v. *FAA*, 589 F.2d 307 (7th Cir. 1978) — 11

TABLE OF AUTHORITIES—Continued

Page

Tuohy v. *Ford Motor Co.*, 675 F.2d 842 (6th Cir. 1982) — 4, 8, 11
U.S. Equal Employment Opportunity Commission v. *City of Minneapolis*, 537 F. Supp. 750 (D. Minn. 1982) — 4
U.S. Equal Employment Opportunity Commission v. *City of St. Paul*, 671 F.2d 1162 (8th Cir. 1982) — 4
Usery v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976) — 8, 9
Weeks v. *Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969) — 6
Wright v. *Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982) — 9, 11

STATUTES, REGULATIONS AND LEGISLATIVE SOURCES

Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 — *passim*
Section 2(a)(2), 29 U.S.C. § 621(a)(2) — 5
Section 2(b), 29 U.S.C. § 621(b) — 5
Section 4(f)(1), 29 U.S.C. § 623(f)(1) — *passim*
Experienced Pilots Act of 1979, Pub. L. No. 96-171, 93 Stat. 1285 (1979) — 11
Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1552 — 10
49 U.S.C. § 1421(a)(5) — 10
Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e- 2000e-17
Section 703e, 42 U.S.C. § 2000e-2(e) — 6
14 C.F.R. § 121.383(c) — 10
113 Cong. Rec. 31,253 (1967) — 5
123 Cong. Rec. 34,320 (1977) — 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1545

WESTERN AIR LINES, INC.,
Petitioner,
v.
CHARLES G. CRISWELL, ALBERT RON
and RULON H. STARLEY,
Respondents.

WESTERN AIR LINES, INC.,
Petitioner,
v.
WESTCOT B. STONE, III, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

Air Line Pilots Association, International ("ALPA") respectfully submits this Brief *Amicus Curiae* in support of the position of petitioner Western Air Lines, Inc. ("Western") with respect to the standards to be applied in jury instructions concerning the bona fide occupational qualification ("BFOQ") defense under § 4 (f) (1) of the Age Discrimination in Employment Act

("ADEA"), 29 U.S.C. § 623(f)(1). Written consents to ALPA's filing of this brief have been obtained from counsel for all parties and filed with this Court on November 14, 1984.[1]

STATEMENT OF INTEREST

As the collective bargaining representative of pilots, including second officers, employed by Western and other commercial airlines, ALPA is concerned with flight deck crew safety standards. Moreover, ALPA is a party joined for purposes of assuring complete relief in other cases involving challenges to the mandatory retirement of second officers/flight engineers at age 60.[2] Hence, ALPA has an interest in this Court's resolution of the appropriate standards for deciding a BFOQ as to the flight deck crew members it represents.

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[1] ALPA is a third-party defendant in *Stone* v. *Western Air Lines, Inc.* The *Stone* action seeks the same relief as plaintiffs seek in *Criswell* for persons who were retired by Western after the *Criswell* action commenced. The district court granted the preliminary injunction motion of the Second Officer plaintiff in *Stone*. Western appealed from that order and consolidated that appeal with its appeal in *Criswell* v. *Western Air Lines, Inc.* Western petitioned for a writ of certiorari in both *Criswell* and *Stone*.

It is ALPA's view that, pursuant to Sup. Ct. R. 19.6, since it was a party below, it is a party in this Court. Counsel for respondents has expressed the view that ALPA is not a party "to the Supreme Court proceeding." *See* Letter of Consent to ALPA's Amicus Brief from Raymond C. Fay to Michael E. Abram, dated October 24, 1984. In order to avoid litigating this issue, ALPA is filing its brief as an *amicus curiae* with permission of respondents.

[2] ALPA is also a party in *Trans World Airlines, Inc.* v. *Thurston*, Nos. 83-997, 83-1325, argued to this Court on October 9, 1984. In *Thurston*, unlike *Criswell*, there was no issue in this Court whether the position of flight engineer on TWA's aircraft is subject to a BFOQ; rather, *Thurston* concerns the lawfulness of TWA's mandatory retirement of captains who are subject to the FAA's Age 60 Rule.

SUMMARY OF ARGUMENT

Section 4(f)(1) of the ADEA authorizes the continued use of an age limit "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business. . . ." 29 U.S.C. § 623(f)(1). ALPA submits that § 4(f)(1) exempts a common carrier's age limit if the elimination of the limit would increase the risk of harm to the carrier's passengers. To establish a BFOQ, a carrier should be required to prove that there is a factual basis for its position that: (1) job performance declines after the BFOQ age; (2) inadequate job performance may lead to injuries or deaths; and (3) the risk of injury cannot be substantially eliminated by practical procedures for individual assessments. ALPA further submits that Western's reliance on factual determinations of the Federal Aviation Administration ("FAA"), made pursuant to its statutory authority to regulate air safety, constitutes a sufficient factual basis for its position concerning the first (age-related decline in performance) and third (practical procedures for individual assessments) elements of the BFOQ.

ARGUMENT

SECTION 4(f)(1) OF THE ADEA EXEMPTS A COMMON CARRIER'S AGE LIMIT WHERE THE ELIMINATION OF THAT LIMIT MAY INCREASE THE RISK OF INJURY TO ITS PASSENGERS

The enforcement history of the ADEA since its enactment in 1967, and its amendment in 1974 to apply to the states, demonstrates that employers regulated by the Act understand that the BFOQ defense is meant to have a narrow application. With rare exception, employers have only sought to justify age-based classifications in two circumstances: (1) in the private sector, common carriers have claimed a BFOQ based on risks to pas-

senger safety, and (2) in the public sector, state and local governments have claimed a BFOQ for law enforcement, corrections, and firefighting personnel, and personnel engaged in flying aircraft.[3] While there has been little difficulty in generally defining which occupations are within the scope of the BFOQ defense, the specific application of § 4(f)(1) to challenged age limits has been chaotic.[4]

All courts of appeals to address the application of § 4(f)(1) to common carriers have held that passenger safety must be taken into account in determining whether age is a BFOQ. Consistent with the language and legislative history of § 4(f)(1), an employer should

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[3] *Private sector employers* other than common carriers have also claimed a BFOQ for pilots. *Gathercole* v. *Global Associates*, 727 F.2d 1485 (9th Cir. 1984); *Tuohy* v. *Ford Motor Co.*, 675 F.2d 842 (6th Cir. 1982); *Houghton* v. *McDonnell Douglas Corp.*, 553 F.2d 561 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977).

[4] Flight engineer retirement: *compare Monroe* v. *United Air Lines, Inc.*, 736 F.2d 394 (7th Cir. 1984) *with Criswell* v. *Western Airlines, Inc.*, 709 F.2d 544 (9th Cir. 1983).

Flight engineer hiring: *compare Smallwood* v. *United Air Lines, Inc.*, 661 F.2d 303 (4th Cir. 1981) *with Murnane* v. *American Airlines, Inc.*, 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982).

Non-commercial pilot retirement: *compare Tuohy* v. *Ford Motor Co.*, 675 F.2d 842 (6th Cir. 1982) *with Gathercole* v. *Global Associates*, 727 F.2d 1485 (9th Cir. 1984).

Firefighter retirement: *compare U.S. Equal Employment Opportunity Commission* v. *City of St. Paul*, 671 F.2d 1162 (8th Cir. 1982) *with Johnson* v. *Mayor and City Council of Baltimore*, 731 F.2d 209 (4th Cir. 1984).

Police officer retirement: *compare Mahoney* v. *Trabucco*, 738 F.2d 35 (1st Cir. 1984) *with U.S. Equal Employment Opportunity Commission* v. *City of Minneapolis*, 537 F. Supp. 750 (D. Minn. 1982).

Police officer hiring: *compare EEOC* v. *Missouri State Highway Patrol*, 555 F. Supp. 97 (W.D. Mo. 1982) *with McMahon* v. *Barclay*, 510 F. Supp. 1114 (S.D.N.Y. 1981).

not be required to prove the truth of each element of a BFOQ which is related to safety, but rather should only be required to prove that its policy is based on substantial facts, not stereotypes, and that there is a factual basis for its position that the elimination of its age-based policy is likely to increase the risk of injury to its passengers.

A. To Establish a BFOQ, an Employer Must Prove that It Has a Factual Basis for Its Position that the Risk of Injury from Age-Related Inadequate Performance Cannot be Eliminated by Practical Individualized Assessment Procedures

In § 4(f)(1) of the ADEA, Congress expressly recognized that age could be a "bona fide occupational qualification reasonably necessary to the normal operation of a particular business," notwithstanding that the articulated general purposes of the Act are to eliminate "the setting of arbitrary age limits regardless of potential for job performance," 29 U.S.C. § 621(a)(2), and "to promote employment of older persons based on their ability rather than age. . . ." 29 U.S.C. § 621(b). Thus, while Congress determined that the assessment of individual ability is generally preferable to the use of age in making employment decisions, it was aware that there are certain occupations for which age *is* an appropriate basis to deny employment to an individual who otherwise satisfies an employer's requirements.

The legislative history of the ADEA provides concrete examples of occupations in which age limitations would be appropriate ("jet pilots," "law enforcement").[5] In each of these occupations, an employee's inadequate performance creates a substantial risk of injury or death to

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[5] 113 Cong. Rec. 31,253 (1967) (remarks of Sen. Yarborough) (jet pilots); 123 Cong. Rec. 34,320 (1977) (remarks of Sen. Javits) (law enforcement officers).

that individual, his co-workers, and/or members of the public who rely on his safe and skillful job performance. Whether as a result of undetected reductions in capacity, or unpredicted incapacitating diseases, police officers who cannot adequately perform their duties, or pilots who cannot respond properly to in-flight emergencies, create a substantial risk of injury fundamentally different from the merely economic costs of undetected declining performance in other employment contexts.

The adverse consequences of an employee's inability to perform these jobs obviously are present at any age. Yet, Congress recognized in § 4(f)(1) that in certain occupations there is a "reasonably necessary" basis not to rely on individual assessments but to permit the imposition of an over-inclusive age limit.[6] To justify that limit, an employer must demonstrate that existing assessment procedures, or reliable and practical alternative procedures, are not likely to eliminate the risk of injury which may result from age-related inadequate

[6] While the BFOQ provision in Title VII, 42 U.S.C. § 2000e-2(e), was construed in *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 235 (5th Cir. 1969) to avoid over-inclusive classifications (employer must prove "a factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved"), even that case acknowledged that over-inclusive classifications would be permitted where it is not possible or practical to make individualized determinations of fitness. *Id.* at 235 n.5. In decisions addressing whether pregnancy constitutes a lawful basis to disqualify flight attendants, the courts focused exclusively on the practicality of individualized determinations, since the carriers did *not* claim that "substantially all" flight attendants in the first two trimesters of pregnancy would not be qualified. *See, e.g., Harriss* v. *Pan American World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980). In ADEA actions, employers have rarely, if ever, maintained that all employees beyond the age limitation are not qualified: it is highly improbable that all employees would be presumptively qualified up to a maximum age limit, and that no employees would be qualified beyond that age.

performance. For instance, an employer may show that the procedures designed to *assess* capacities at the time of an examination may become less *predictive* of those capacities in the intervals between testing, as the rate of physiological or psychological change related to aging significantly increases beyond the BFOQ age. Where there is both an age-related decline in performance, and a risk of substantial injury from age-related inadequate performance which cannot be eliminated by practical individualized assessment procedures, the age limit is lawful.

These elements of a BFOQ can only be proved by facts which are difficult, if not impossible, to establish with certainty.[7] It is especially difficult to evaluate the contribution of employment policies in minimizing the risk of highly unlikely and unpredictable events (such as airplane accidents).

> The employer must of course show a reasonable basis for its assessment of risk of injury/death. But it cannot be expected to establish this to a certainty, for certainty would require running the risk until a tragic accident would prove that the judgment was sound.

[7] The evidentiary problems in a challenge to an airline's established mandatory retirement policy for employees performing safety-related functions include: (1) there is no direct evidence concerning employee performance beyond the BFOQ age, so that an employer must rely on studies of the effects of aging on other populations, and trends in its own workforce of younger employees; (2) the low incidence of airline accidents complicates the analysis of risk to passenger safety attributable to any single flight deck crew member; and (3) the predictive value of any proficiency or medical exam, and the likely improvements in predictive value of using alternative procedures, are inherently inexact, a subject of informed opinion rather than definitive proof. Yet, Congress in § 4(f)(1) authorized the creation of a BFOQ for jet pilots and other occupation in which passenger and/or public safety is at stake.

Usery v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224, 235 (5th Cir. 1976).[8] Yet the lower federal courts are in accord in recognizing the importance of safety obligations in reviewing a carrier's continued use of age limitations.[9]

These decisions do not, however, specify with what degree of certainty an employer must prove the relation between age and declining job performance; the relation between declining job performance and risk of injury; and the impracticality of individualized assessment procedures. There are at least two possible approaches: (1) to require the employer to prove the "truth" of each contested element, or (2) to adopt a standard which requires substantial, credible evidence material to the elements of a BFOQ, but does not require a fact-finder to make an ultimate judgment concerning acceptable levels of risk of injury to passengers.

As usual in matters of statutory construction, the proper standard derives from the intent of Congress as manifested in the language of the statute. To establish a BFOQ, § 4(f)(1) requires judicial consideration of

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[8] *See Burwell* v. *Eastern Air Lines, Inc.*, 633 F.2d 361 (4th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981) (addressing mandatory leave policies for pregnant flight attendants):

> Safety practices of this nature are not designed to govern a certain disaster. Risk management involves the elimination of potential impediments to safety before they materialize into unfortunate realities.

[9] *Murnane* v. *American Airlines, Inc.*, 667 F.2d 98, 101 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982); *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d at 234; *Hodgson* v. *Greyhound Lines, Inc.*, 499 F.2d 859, 863 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975). *See generally Orsel* v. *City of Wauwatosa Fire Dept.*, 697 F.2d 743, 755 (7th Cir.), *cert. denied*, —— U.S. ——, 104 S.Ct. 484 (1983); *Tuohy* v. *Ford Motor Co.*, 675 F.2d at 845; *EEOC* v. *County of Santa Barbara*, 666 F.2d 373, 377 (9th Cir. 1982).

the circumstances of each "particular business," and of what is "*reasonably* necessary to the normal operation" of that business. Congress certainly did not authorize employers to rely on mere stereotypes. Yet it is far more consistent with the language of the statute and articulated congressional concerns to construe § 4(f)(1) to require a carrier to prove that there is a substantial, credible basis in fact for its age-based policies, than to prove the truth of each element of the BFOQ.[10] For example, to prove a legally significant nexus between inadequate job performance and a risk to passenger safety, it should be sufficient for the employer to show that passenger safety considerations are an integral aspect of that job in terms of "the normal operation" of its business, *i.e.*, that selection, training and evaluation procedures for a particular job manifest a concern for passenger safety. *See Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d at 236. For similar reasons, § 4(f)(1) does not require that technical and controversial issues of aerospace medicine, concerning the effects and predictability of age-related physiological and psychological changes, be resolved on an airline-by-airline, jury-by-jury basis; rather, § 4(f)(1) should be construed to permit an airline to continue to use an age limit based on controversial scientific evidence as long as there is substantial factual support for its position.[11]

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[10] In traditional tort cases, juries use a calculus of risk to determine whether plaintiff has proved that the level of safety should be *increased* above the level the carrier has established. Under the BFOQ instructions approved by the court below, the jury was asked whether the carrier had proved that the level of safety it has established should not be *decreased* to the minimum standards established by government regulations.

[11] In *Wright* v. *Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982), the court addressed the issue of whether the risk of harm to the unborn children of women workers from their exposure to toxic hazards in the workplace was significant enough to justify the disparate impact of the challenged employment policy. With respect to the medical

In the instant case, it was particularly inappropriate to have the jury resolve the issue whether "it was highly impractical for Western to deal with each Second Officer over age 60 on an individualized basis" by weighing the determinations of the FAA concerning the reliability of medical assessment procedures against the contrary opinions of plaintiffs' expert witnesses. The FAA, pursuant to its statutory authority under 49 U.S.C. § 1421 (a)(5), mandates that two of the three members of the flight deck crew in commercial air carrier operations must stop flying at age 60, 14 C.F.R. § 121.383(c), on the grounds "that 'sudden incapacity due to . . . medical defects becomes significantly more frequent in any group reaching age 60' and the possibility of sudden incapacity 'due primarily to heart attacks and strokes, cannot be predicted accurately as to any specific individual on the basis of presently available scientific tests and criteria.'" *Rombough* v. *FAA*, 594 F.2d 893, 897 (2d Cir. 1979). Moreover, the FAA has refused to consider requests for individual exemptions from the Age 60 Rule based on its determination that medical testing remains inadequate to make individualized assessments concerning the risk of sudden incapacitation after age 60. *Id.* at 898. *See Keating* v. *FAA*, 610 F.2d 611 (9th

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evidence material to proving the employer's position, the court held that:

> [t]o establish the requisite degree and cast of the risk of harm, it is not necessary to prove the existence of a general consensus on the points within the qualified scientific community. It suffices to show that within that community there is so considerable a body of opinion that significant risk exists, and that it is substantially confined to women workers, that an informed employer could not responsibly fail to act on the assumption that this opinion might be the accurate one.

Id. at 1191.

Cir. 1979); *Gray* v. *FAA*, 594 F.2d 793 (10th Cir. 1979); *Starr* v. *FAA*, 589 F.2d 307 (7th Cir. 1978).[12]

At the trial in this case, Western presented these determinations in explaining why it is not practical to make assessments of individual capacities beyond age 60. It is certainly within the "normal operation" of the commercial airline business for Western to be aware of Federal Air Regulations governing its operations, and the articulated factual determinations underlying these regulations. An employer's reliance on these determinations is neither "arbitrary" nor based on stereotypes.[13]

The court below ruled that the medical rationale of the FAA Age 60 Rule was not controlling, on the ground that "the agency has never applied that rule to second officers." 709 F.2d at 551. Yet the FAA's decision not

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[12] In response to criticisms of the FAA Age 60 Rule, Congress enacted the Experienced Pilots Act of 1979, Pub. L. No. 96-171, 93 Stat. 1285 (1979), to request the National Institutes of Health ("NIH") to conduct a study of the medical basis for the FAA Age 60 Rule and related questions concerning the effects of aging on pilot performance. The Report of the National Institute of Aging Panel on the Experienced Pilots Study ("NIA Report"), issued in August, 1981, confirmed the validity of both scientific bases for the FAA Age 60 Rule. The NIA Report concluded that (1) changes related to aging adversely affect capacities crucial to pilot performance; and (2) there is no assessment procedure to determine accurately which individuals are less affected by this aging process.

[13] *Compare Gathcreole* v. *Global Associates*, 727 F.2d 1485 (9th Cir. 1984) (employer which is not subject to the FAA Age 60 Rule may rely on FAA regulations, as required by its contract with the U.S. Army under which it provided air transportation services, in retiring its pilots at age 60: "Global was in no position to challenge the applicability and soundness of or evidentiary support for the FAA regulations") *with Tuohy* v. *Ford Motor Co.*, 675 F.2d 842 (6th Cir. 1982) (operator of passenger aircraft not subject to the FAA Age 60 Rule could not rely on the factual determinations underlying that regulation in imposing an age 60 mandatory retirement age for its pilots).

to apply a regulatory age limit to the third seat does not preclude the carrier from setting higher safety standards for the job. Every court which has upheld a BFOQ in a regulated industry has done so in the context of the absence of an express regulation requiring an employer to implement that job qualification. In setting its own standards, a carrier is entitled to rely on the FAA's medical justifications for an age limit, because the medical risk of incapacitation and viability of individual assessment procedures do not vary from one flight deck crew position to another. Indeed, two of the plaintiffs here were former captains who were subject to the FAA Age 60 Rule; there was certainly no change in their medical facts because they sought to be second officers. Yet, the trial court permitted plaintiff's expert witness to challenge the entire basis of the FAA Rule by testifying, in the court's words, "that it was feasible to determine on the basis of individual medical examination whether *flight deck crew members*, including those over age 60, were physically qualified to continue to fly." 514 F. Supp. at 389 (emphasis added). A regulated air carrier is not required by the ADEA to defend the medical justification for an FAA rule against this type of testimony, but is entitled to rely on the FAA's determinations in establishing a BFOQ for second officers.

B. The Jury Instructions Were Erroneous and Prejudicial

The district court instructed the jury that Western must prove "by a preponderance of the evidence" that (1) it was "highly impractical" for Western to evaluate a second officer "over age 60" with respect to "his particular ability to perform his job safely" *and* (2) that "some second officers (flight engineers) over age 60 possess traits . . . which preclude safe and efficient job performance" that can only be ascertained by "knowing their age." 514 F. Supp. at 389-90, n.7.

This test imposed on Western a nearly insurmountable burden of proof. At the most fundamental level, the instruction utterly failed to carve out any meaningful role for the protection of passenger safety. The issue is not whether a second officer after the age of 60 has the "ability" to perform his job "safely," but whether the existing assessment procedures do a sufficient job of screening out second officers who *may become* disabled between the tests, and whether there is a risk of injury to passengers if a second officer *failed* to perform his job safely. Moreover, under the instructions, the jury lacked any standard to judge whether Western had to establish to a certainty that passenger injury would result from the age-related impairment or incapacitation of a second officer, or whether it would be sufficient for Western to demonstrate the possibility of this result to some lesser degree of certainty.

The court, in effect, instructed the jury to find for Western only if it had proved facts that by anyone's experience were highly improbable. Since the employer obviously utilizes a number of testing procedures to evaluate the "abilities" of its flight crew, and these tests are considered adequate through the pilot's 59th year, Western could not prove that it was "highly impractical" to evaluate the "ability" of second officers once they reach age 60. As to the second required element, it would be surprising if anyone possessed "traits" which could only be ascertained by "knowing their age." [14] The issue is not whether age is a *better* means than individualized assessments to identify an employee's "traits"; rather, the issue is whether the risk of injuries from erroneous assessments of individuals justifies an over-inclusive rule. In short, the court created a

[14] Indeed, if anyone had possessed such a trait, it would be possessed by all persons of that age; yet the instruction only invited the jury to consider whether "some" second officers possessed such traits. 514 F. Supp. at 390 n.7.

standard of proof under § 4(f)(1) that virtually assumed this defense did not exist at all.

CONCLUSION

For the foregoing reasons, and those advanced by petitioner Western Airlines, Inc., the decision of the Ninth Circuit Court of Appeals approving the BFOQ jury instruction should be reversed.

Respectfully submitted,

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November 14, 1984

SUPPLEMENTAL APPENDIX

EXPERIENCED PILOTS ACT OF 1979

Public Law No. 96-171, 93 Stat. 1285 (1979)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Director of the National Institutes of Health, in consultation with the Secretary of Transportation, shall conduct a study to determine—

(1) whether an age limitation which prohibits all individuals who are sixty years of age or older from serving as pilots is medically warranted;

(2) whether an age limitation which prohibits all individuals who are older than a particular age from serving as pilots is medically warranted;

(3) whether rules governing eligibility of first- and second-class medical certification, as set forth in part 67 of title 14 of the Code of Federal Regulations (as in effect on the date of enactment of this Act), are adequate to determine an individual's physical condition in light of existing medical technology;

(4) whether rules governing the frequency of first- and second-class medical examinations, as set forth in part 67 of title 14 of the Code of Federal Regulations (as in effect on the date of enactment of this Act), are adequate to assure that an individual's physical condition is being satisfactorily monitored; and

(5) the effect of aging on the ability of individuals to perform the duties of pilots with the highest level of safety.

The Director shall complete such study and submit a report of the results thereof to Congress within one year after the date of enactment of this Act. In conducting

such study the Director shall utilize all available studies and data which are relevant to such study.

SEC. 2. No funds are authorized to be appropriated for the fiscal year commencing October 1, 1979, in addition to funds otherwise available to carry out the study described in section 1 of this Act.

Approved December 29, 1979.

AMICUS CURIAE

BRIEF

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BRIEF AMICUS CURIAE FOR PAN AMERICAN WORLD AIRWAYS, INC. IN SUPPORT OF PETITIONER

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23 pp

TABLE OF CONTENTS

	Page
Interest of amicus	1
Introduction and summary of argument	3
Argument	5
I	
Under the ADEA, plaintiff bears the burden of persuading the trier of fact that the defendant discriminated against the plaintiff on the basis of age	5
II	
Under the ADEA, a safety-based employment policy must be upheld under § 4(f)(1) if it was made in good faith with a rational basis in fact	10
Conclusion	17

TABLE OF AUTHORITIES CITED

Cases

Page

Board of Trustees v. Sweeny, 439 U.S. 24 (1978) 5, 6, 7, 9

Corning Glass Works v. Brennan, 417 U.S. 188 (1974) 9

Crisswell v. Western Airlines, Inc., 709 F.2d 544 (9th Cir. 1983) *cert. granted* ___ U.S. ___ 53 U.S.L.W. 3235 (Oct. 10, 1984) 7, 8, 9

Dothard v. Rawlinson, 433 U.S. 321 (1977) 16

Douglas v. Anderson, 656 F.2d 528 (9th Cir. 1981) 6, 7

EEOC v. County of Santa Barbara, 666 F.2d 373 (9th Cir. 1982) 15

E.E.O.C. v. Wyoming, 460 U.S. 226 11

Equal Employment Opportunity Commission v. Pan American World Airways, Inc. et al. (N.D. Cal. No. C-81-3636) 2

Hagelthorn v. Kennecott Corp., 710 F.2d 76 (2d Cir. 1983) 6

Harriss v. Pan American World Airways, Inc., 649 F.2d 670 (9th Cir. 1980) 14, 15

Hoefelman v. Conservation Comm'n of Missouri Dept. of Conservation, 541 F.Supp. 272 (W.D. Mo. 1982), *affirmed*, 718 F.2d 281 (8th Cir. 1983) 15

Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979) 5, 6, 7

Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1977) 8

Lovelace v. Sherwin-Williams Co., 681 F.2d 230 (4th Cir. 1982) 6

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 5, 6, 7, 9

Marshall v. Goodyear Tire and Rubber Co., 554 F.2d 730 (5th Cir. 1977) 6, 7, 8, 9

TABLE OF AUTHORITIES CITED

CASES

Page

Marshall v. Westinghouse Elec. Corp., 576 F.2d 588 (5th Cir. 1978) 6

Morton v. Mancari, 417 U.S. 535 (1974) 11

Murnane v. American Airlines, Inc., 667 F.2d 98, 101 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982) 14, 15, 16

Radzanower v. Touche Ross & Co., 426 U.S. 148 (1976) 11

Reeves v. General Foods Corp., 682 F.2d 515 (5th Cir. 1981) 6

Silver v. New York Stock Exchange, 373 U.S. 341 (1963) 11

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) 5, 6, 7, 9

Tuohy v. Ford Motor Co., 675 F.2d 842 (6th Cir. 1982) 15

Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976) 15

Statutes

Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-633a 2, 3, 6, 9, 11, 12

§ 4(a), 29 U.S.C. § 623(a) 7, 8, 9

§ 4(f)(1), 29 U.S.C. § 623(f)(1) ....passim

Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e-2000e17 3

§ 703(a), 42 U.S.C. § 2000e-2 7

§ 703(e)(1), 42 U.S.C. §§ 2002e-2(e) 6

Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) 9

14 C.F.R. § 121.383(c) 2

49 U.S.C. § 1421(b) 10

TABLE OF AUTHORITIES CITED

Rule

	Page
Federal Rules of Civil Procedure, Rule 8(c)	8

Other Authorities

Belton, Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice, 34 Vand L. Rev. 1205, 1214 (1981)	8
H.R. Rep. No. 805, 90th Cong., 1st Sess., reprinted in 1967, U.S. Code Cong. & Admin. News, 2213, 2220	14
Note, The Age Discrimination in Employment Act of 1967, 90 Harv.L.Rev. 380, 395 (1976)	6
Schlei and Grossman, Employment Discrimination Law 499-500 (2d ed. 1983)	5
Sen. Rep. No. 723, 90th Cong., 1st Sess. 7 (1976)	14
3 Larson, Employment Discrimination § 102.41 (1984)	5
5 Wright & Miller, Federal Practice and Procedure: Civil §§ 1270 *et seq.* (1969)	8
90th Cong., 1st Sess. 103 (1967) [hereinafter cited as "1967 Senate Hearings]	12, 13
113 Cong. Rec. 31254	13

No. 83-1545

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

WESTERN AIR LINES, INC.,
Petitioner,

vs.

CHARLES G. CRISWELL, ALBERT RON and RULON H. STARLEY,
Respondents.

WESTERN AIR LINES, INC.,
Petitioner,

vs.

WESTCOT B. STONE, III, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE FOR PAN AMERICAN WORLD AIRWAYS, INC. IN SUPPORT OF PETITIONER

INTEREST OF AMICUS

This brief, in support of Western Air Lines, Inc., is filed pursuant to the written consent of both parties on behalf of Pan American World Airways, Inc. ("Pan Am"). Pan Am is a commercial air carrier which has been

named as defendant in a lawsuit alleging violations of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621-633a, on behalf of certain persons seeking to serve as flight engineers past the age of sixty.[1]

Pursuant to the Federal Aviation Administration's "Age 60 Rule," 14 C.F.R. § 121.383(c), airlines are prohibited from permitting pilots (captains and co-pilots) from flying commercial airliners past the age of sixty. This rule, however, does not explicitly apply to flight engineers, who occupy the "third seat" in the cockpit. Nevertheless, for safety reasons Western Air Lines, Pan Am, and many other airlines have adopted policies relating to service in their third seat beyond age sixty. In the cases which have been brought against them, the airlines have asserted a defense under § 4(f)(1) of the ADEA, 29, U.S.C. § 623(f)(1), as did Western Air Lines.

The issues granted certiorari by the Court in this case concern 1) whether, when an employee has established a *prima facie* case under the ADEA, the burden of persuasion shifts to the employer to prove that the determining cause was a reasonable factor other than age, and 2) what standards should govern an airline's ADEA § 4(f)(1) defense when it claims to have adopted policies based upon public safety concerns. While the factual circumstances vary somewhat from case to case, each involves the application of the ADEA to the relevant facts. Thus, Pan Am and other airlines have an interest in the legal standards to be enunciated and applied in this case.

Pan Am also believes that the points it presents below will not be merely cumulative of the views of the parties and that consideration of this brief may benefit the Court.

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[1] *Equal Employment Opportunity Commission v. Pan American World Airways, Inc.* et al. (N.D. Cal. No. C-81-3636).

INTRODUCTION AND SUMMARY OF ARGUMENT

Conflict has arisen among Circuit Courts regarding interpretation of the exclusion from liability for discrimination found in § 4(f)(1) of the ADEA. The controversy has emanated from courts assigning inconsistent roles to the language in that section which refers to distinctions based on "reasonable factors other than age" ("RFOA"). One line of precedent interprets the RFOA language as placing a burden on the defendant to prove that the challenged action was motivated by reasonable factors other than age, thereby shifting the burden of persuasion to the defendant on the ultimate question of discrimination. Another line of authority looks to the structure of the statute as a whole and to the common understanding of the function of an affirmative defense, and leaves the burden of persuasion with respect to the basic issue of discrimination with the plaintiff at all times.

Another tangle of inconsistency derives from courts' application of the *bona fide* occupational qualification ("BFOQ") language of § 4(f)(1). Some courts, in the name of consistency with precedent under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e17, ("Title VII"), have interpreted the ADEA's § 4(f)(1) exception in a narrow, rigid manner. Other courts, in view of manifest differences between age as an employment criterion and the classifications treated in Title VII, have allowed greater latitude to employers raising a § 4(f)(1) defense under the ADEA.

Pan Am contends that the burden of persuasion on the ultimate issue of age discrimination should always rest on the plaintiff. A careful analysis of the statute, keeping in mind accepted notions of proper proof burdens in civil cases and the fact that the ADEA's *prohibitory* language is in conformity with that of Title VII, reveals that the

RFOA provision should not have the effect of shifting the burden of persuasion to the defendant. Instead, the RFOA language is apparently designed to broaden the class of age-based distinctions which are permissible beyond those allowed strictly as *bona fide* occupational qualifications reasonably necessary to the ordinary operation of a business. The RFOA language is thus, we suggest, an explicit indication that employers should be allowed flexibility in crafting employment policies where both age and other factors are involved.

Pan Am submits that deference to the statutory language of § 4(f)(1)—which is broader than the BFOQ provision of Title VII precisely because of the addition of the RFOA language—and to the legislative history of the ADEA should lead this Court to adopt a flexible interpretation of § 4(f)(1). This approach would allow employers latitude to adopt employment policies which would not necessarily qualify as BFOQ's under Title VII, so long as these policies are indeed based in good faith on "reasonable factors" other than age. We therefore urge this Court to recognize, as lower courts have not, that the thrust of the RFOA language is to broaden the scope of justification beyond that recognized as a BFOQ in Title VII cases. Further, we urge that explicit recognition be given to the severity of potential injury in assessing the good faith and reasonableness of safety-related employment policies. Such a formulation would not penalize employers for decisions in good faith pursuit of safety where risk of severe physical injury constitutes the reasonable basis for an employment policy.

ARGUMENT

I

UNDER THE ADEA, PLAINTIFF BEARS THE BURDEN OF PERSUADING THE TRIER OF FACT THAT THE DEFENDANT DISCRIMINATED AGAINST THE PLAINTIFF ON THE BASIS OF AGE

This Court has made it clear that, with respect to the ultimate issue of intentional discrimination in a Title VII suit, the plaintiff retains the burden of persuasion at all points during a trial. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). The defendant bears only a burden of production—to " '*articulate* some legitimate, non-discriminatory reason for the employee's rejection' "—and even only after the plaintiff has succeeded in proving a prima facie case of discrimination. *Id.* (emphasis added) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)); *see also Board of Trustees v. Sweeny*, 439 U.S. 24, 25 (1978).

The Supreme Court, however, has not specifically extended the three-step scheme of proof announced in *McDonnell Douglas*[2] to cases arising under the ADEA. That extension, although well recognized by commentators,[3] has only been made in the Circuit Courts. In *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1015 (1st Cir. 1979), the

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[2] Under *McDonnell Douglas*, a plaintiff in a Title VII trial carries an initial burden to establish a prima facie case of discrimination. If the plaintiff is successful in this endeavor, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Plaintiff then has the opportunity to show that the employer's stated reason for the rejection was pretext. 411 U.S. at 802-04.

[3] *See* Schlei and Grossman, *Employment Discrimination Law* 499-500 (2d ed. 1983); 3 Larson, *Employment Discrimination* § 102.41 (1984).

Court discussed the applicability of *McDonnell Douglas* to ADEA suits, observing:

> [W]e see no inherent reason why it is any less a "sensible, orderly way to evaluate the evidence" in an age discrimination case than in any other. *McDonnell Douglas* meets a problem of proof that may be present in any case where motivation is in issue, but does not alter the traditional burdens of proof in civil litigation, and is not intended to deflect the factfinder from the central issue of whether the employer was motivated by discriminatory factors.

The holding and reasoning of *Loeb,* along with harmonious decisions from other circuits, together with the fact the prohibitory provisions of Title VII and the ADEA are identically structured to focus on discrimination "because of " a suspect classification, make a compelling case that the *McDonnell Douglas/Sweeney/Burdine* scheme of proof should control in ADEA actions. [4] *See, e.g., Hagelthorn v. Kennecott Corp.,* 710 F.2d 76, 80-81 (2d Cir. 1983); *Reeves v. General Foods Corp.,* 682 F.2d 515, 521 (5th Cir. 1981); *Lovelace v. Sherwin-Williams Co.,* 681 F.2d 230, 238 (4th Cir. 1982); *Douglas v. Anderson,* 656 F.2d

[4] Case law developed from judicial enforcement of title VII provides, in several areas, useful guidelines for the ADEA's enforcement. *See generally* Larson, *supra* note 3, at §§ 102:40-102:44. Proper enforcement of the ADEA may require, however, that in certain instances the plaintiff shoulder a heavier burden than under Title VII. This is true, first, because replacement of older, retiring workers by younger workers is a non-discriminatory norm in virtually all work places. *See Marshall v. Westinghouse Elec. Corp.,* 576 F.2d 588, 591-92 (5th Cir. 1978)(quoting *Marshall v. Goodyear Tire and Rubber Co.,* 554 F.2d 730, 736 (5th Cir. 1977)). Secondly, assumptions about the normal behavior of employers are different with respect to older workers than with respect to female or minority workers. *See* Note, *The Age Discrimination in Employment Act of 1967,* 90 Harv.L.Rev. 380, 395 (1976). Thirdly, Congress recognized a higher degree of correlation between Title VII protected statuses and job related abilities. *See infra* at 13-15. Finally, the ADEA's justification provision is broader than that of Title VII. *Compare ADEA § 4(f)(1), 29 U.S.C. § 623(f)(1), with* Title VII § 703(e)(1), 42 U.S.C. §§ 2002e-2(e).

528, 532 (9th Cir. 1981); *compare* Title VII § 703(a), 42 U.S.C. § 2000e-2, *with* ADEA § 4(a), 29 U.S.C. § 623(a).

The Court below approved a district court jury instruction that placed on defendant the burden to prove that the decision not to allow plaintiffs to downbid was motivated by "reasonable factors other than age."[5] *Criswell v. Western Airlines, Inc.,* 709 F.2d 544, 552 (9th Cir. 1983) *cert. granted* ____ U.S. ____ 53 U.S.L.W. 3235 (Oct. 10, 1984). This decision ignores the logic of *McDonnell Douglas, Sweeny* and *Burdine,* and it conflicts with specific holdings by courts of the First and Fifth Circuits. In *Loeb v. Textron, Inc,.* 600 F.2d at 1011-12, a decision cited with approval by this Court in *Burdine,* 450 U.S. at 252 n.4, the First Circuit disapproved jury instructions similar to the ones approved by the ninth Circuit in this case. *Loeb* held that jury instructions which equated the RFOA exception with "legitimate non-discriminatory reasons" and saddled the defendant with the burden of proving these other reasons, violated proof principles in *McDonnell Douglas* and *Sweeny. Id.* at 1008-12.

In specifically rejecting the Fifth Circuit's holding in *Marshall v. Westinghouse,* 576 F.2d at 592, the Ninth Circuit in this case based its holding exclusively on the notion that the RFOA language, apart from the other language of § 4(f)(1), constitutes a discrete "affirmative defense." *Criswell,* 709 F.2d at 553. The panel stated that Western had "confused[d] the elements of and

[5] ADEA § 4(f)(1), 29 U.S.C. § 623(f)(1) provides as follows:
It shall not be unlawful for an employer, employment agency, or labor organization—

> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age.

burdens borne in the case-in-chief and those of an affirmative defense." *Id.* at 552. Without additional explanation, the Court rejected the reasoning in *Marshall v. Westinghouse* and concluded, "we do not believe that a statutory exception may be properly analogized to the second stage of the case-in-chief under a disparate treatment theory." *Id.* at 553.

With due respect to the Court below, it misperceives the meaning of the RFOA language when it interprets that provision as shifting to defendant the burden of proving that its action was taken for reasons other than age. At common law, an affirmative defense was a defense that admitted the basic validity of plaintiff's claim but at the same time set up new matters to avoid liability.[6] *See* Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice,* 34 Vand L. Rev. 1205, 1214 (1981). Rule 8(c) of the Federal Rules of Civil Procedure descended directly from this common law rule. *Id.; see also* 5 Wright & Miller, Federal Practice and Procedure: Civil §§ 1270 *et seq.* (1969). If an employer has acted with respect to an employee only on the basis of factors "other than age," logically, the employer cannot have discriminated against that individual "because of such individual's age," nor would the condition of § 4(f)(1) that the action be "otherwise prohibited" be satisfied. *Compare* 29 U.S.C. § 623(f)(1) (RFOA provision) *with* 29 U.S.C. § 623(a) (prohibitory provisions). *Cf. Los Angeles Dept. of Water & Power v. Manhart,* 435 U.S. 702, 712-13 (1977) (under the Equal Pay Act, an

[6] In a puzzling inconsistency, the Court below, in deciding the pretext issue, alluded to the "confession and avoidance" essence of an affirmative defense:"[o]nly when discrimination has been established does an affirmative defense come into play." 709 F.2d at 554.

actuarial distinction based entirely on sex is not based on a factor other than sex).[7]

By instructing a jury that defendant must prove " 'by a preponderance of the evidence' " that its action was motivated by "reasonable factors other than age," *Criswell,* 709 F.2d at 552, the district court below transformed the burden on plaintiff to prove discrimination into a burden on defendant to prove no discrimination. This shifting of the ultimate burden of persuasion is at odds with the usual policy of our jurisprudential system to place the burden of proof on the party desiring change. *Marshall v. Goodyear,* 576 F.2d at 591. It also does not follow logically from the language of the prohibitory section of the ADEA, which requires proof of discrimination "because of" age. 29 U.S.C. § 623(a). Moreover, such a shift directly conflicts with the principle established in *McDonnell Douglas, Sweeny* and *Burdine*—that the ultimate burden of persuasion in a discrimination case properly rests on the plaintiff. We urge this Court to reverse the judgment below and affirm that an ADEA plaintiff at all times bears the ultimate burden to establish discrimination because of age.

[7] The Court below cited *Corning Glass Works v. Brennan,* 417 U.S. 188 (1974), as supporting its decision by analogy. In that case, this Court considered application of the statutory exceptions to the Equal Pay Act of 1963 (the "Act"), 29 U.S.C. § 206(d)(1). The Act prohibits payment of different wages to men and women doing "equal work." *Id.* One of the Act's four exceptions is for a "differential based on any other factor other than sex." The Supreme Court observed that once the Secretary proves that "the employer pays workers of one sex more than workers of the opposite sex, the burden shifts to the employer to show that the differential is justified under one of the Act's four exceptions." 417 U.S. at 196.

The analogy is misplaced. The ADEA requires not that people of different ages be treated identically but that individuals not be discriminated against *because* of age. 29 U.S.C. § 623(a). In contrast, by its terms the Equal Pay Act requires only that plaintiff show a differential in pay for equal work. It expressly reserves to defendant the burden of justifying such a differential.

II

UNDER THE ADEA, A SAFETY-BASED EMPLOYMENT POLICY MUST BE UPHELD UNDER § 4(f)(1) IF IT WAS MADE IN GOOD FAITH WITH A RATIONAL BASIS IN FACT

Airlines operate with the ever-present possibility of disaster, which may affect hundreds of persons. Commercial airlines are under a statutory duty to operate "with the *highest possible* degree of safety in the public interest." 49 U.S.C. § 1421(b) (emphasis supplied). An airline's obligation to operate safely therefore arises from an explicit command of Congress which is set forth in the Federal Aviation Act, as well as from humanitarian concerns, from duties imposed by state tort law, and from the rational business decision to avoid financial risks. Consequently, airlines are obligated to develop and maintain policies that are particularly designed to achieve that goal.

The opinion below construes the ADEA's § 4(f)(1) exception to require that employers convince a court or a jury that adoption of an age discriminatory policy was *the correct response* to a particular safety concern. In the real world of business decision making, important judgments often must be made against a limited factual background, with the experience and expertise of the decision-maker functioning as critical determinants in reaching a reasonable decision. By allowing a court or jury to second guess an employer's judgment—even in circumstances where that judgment was a reasonable, good faith attempt to increase safety levels for its employees and customers—the Ninth Circuit has imposed a very steep, unnecessary and unintended burden upon employers who seek safety.

Where human safety is involved, the adoption of such a heavy burden is inappropriate, and will impose societal

costs which greatly outweigh the laudable benefits promoted by the ADEA. In ADEA suits where the challenged practice involves safety issues, the cost of a narrow, rigid standard under § 4(f)(1) of the ADEA—that of increased risk of human injury or death—becomes morally and legally unacceptable. A business might in good faith make a rational judgment, based on reasonable if not wholly uncontrovertible facts, that drawing a line based on age is the most practical way to achieve a safety objective. It is not credible to Pan Am that Congress intended that such a judgment expose that business to potential liability under the ADEA.

Under the Ninth Circuit's standard, from an employer's perspective, unless it is clear that the required burden can be met, the safety-related policy must be abandoned. In addition, an employer must consider the likelihood that, given a strict burden of proof, it would be put to the costly and time-consuming endeavor of defending its choice in a lawsuit. *See E.E.O.C. v. Wyoming*, 460 U.S. 226, 258, n. 5 (Justices Burger, Powell, Rehnquist and O'Connor, dissenting). Thus, it is critical to adopt a standard which does not unduly deter an employer from instituting in good faith reasonable policies which it has a rational basis for believing will maximize safety.

An airline, like this Court, is "not at liberty to pick and choose among congressional enactments." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). When two potentially conflicting statutory systems are nevertheless capable of co-existence, it is the duty of this Court to regard each as effective. The question, therefore, is not which provision must be ignored, but how the statutory systems may be reconciled. *See, e.g., Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976); *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963). Even the most cursory examination of the Federal Aviation Act and the ADEA reveals that the two statutory systems may co-exist. ADEA

§ 4(f)(1) expressly permits employers to use age as a criteria when it is reasonably necessary to the operation of a particular business, *or* where the distinction is based on reasonable factors other than age. 29 U.S.C. § 623(f)(1).

The relevant statutory language and the legislative history of the ADEA suggest a construction of § 4(f)(1) quite different than the narrow one applied to the BFOQ exception in non-safety cases under Title VII. Specifically, Title VII limits its BFOQ exception to "those certain instances" where discrimination is reasonably necessary to the normal operation of that particular business or enterprise; the parallel ADEA provision contains no such limiting language and it *adds* the RFOA language to the BFOQ language. *Compare* 42 U.S.C. § 2000e-2(e) and 29 U.S.C. § 623(f)(1). More importantly, the ADEA's legislative history, rather than indicating that the § 4(f)(1) exception should be narrowly construed, demonstrates an intent that the law be flexible, responsive to particular fact situations, and sensitive to safety concerns present in certain businesses. During Senate Hearings concerning the ADEA, no controversy existed as to a legitimate correlation between age and the abilities needed to perform some kinds of jobs. Senator Pell specifically expressed his concerns that this correlation not be overlooked, especially when safety is involved:

> I am 48 and I have nowhere near the reflexes I had 10 years ago. I am not as good in mathematics and things of that sort and I do not think we ought to put a straight jacket on endeavors which have a safety involvement.

Age Discrimination in Employment: Hearings on Discrimination Bills Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. 103 (1967) [hereinafter cited as "1967 Senate Hearings"]. In these hearings, Secretary of Labor Willard Wirtz, whose Department worked with Senator Yarborough in drafting the Senate version of the age discrimination bill, [8] explicitly recognized the link between age and certain job-related characteristics. He also offered his view that the bill (with a provision identical to § 4(f)(1) contained in final law) accommodated this reality:

> The relevant inquiry about S. 830 is not about its purpose but whether the situation it covers permits administrative distinction between cases where there is good and sufficient reason for adjusting the incidents of a person's employment to his age, and those cases where there is not that justification. This bill is drawn with close attention to this key distinction.

1967 Senate Hearings at 37.

Furthermore, both the House and Senate Reports concerning the ADEA recognize the possible interplay between the law and safety concerns. The Reports also focus on the flexibility and fact-sensitivity needed for proper administration of the law and discuss the specific circumstances of several industries, emphasizing the need to consider each on a case-by-case basis. The Senate Report reads, in pertinent part:

> In industries such as the trucking industry, regulatory agencies, for the safety and convenience of the public, have imposed requirements as to the physical qualifications of employees. It is not the purpose of this legislation to require the employment of anyone, regardless of age, who is not qualified on grounds other than age to perform the job.
>
> Many different types of employment situations prevail. Administration of this law must place emphasis

[8] *See* 113 Cong. Rec. 31254.

> on case-by-case basis, with unusual working conditions weighed on their own merits. The purpose of this legislation, simply stated, is to insure that age, within the limits prescribed herein, is not a determining factor in a refusal to hire.

Sen. Rep. No. 723, 90th Cong., 1st Sess. 7 (1976).[9]

The lower courts have recognized that safe transportation of airline passengers is the essence of an airline's business. *Murnane v. American Airlines, Inc.*, 667 F.2d 98, 101 (D.C. Cir. 1981), *cert. denied*, 456 U. S. 915 (1982). *See also Harriss v. Pan American World Airways, Inc.*, 649 F.2d 670, 676 (9th Cir. 1980) (applying Title VII), in which the district court aptly observed:

> As an air carrier with a public duty to operate with the highest degree of safety, [commercial airlines are] in the business of avoiding and managing the risks resulting from low probability occurrences which could have extremely serious consequences. Indeed, such risk management is of the essence of [their] business, since aircraft accidents and incidents are invariably unique and low probability occurrences.

Harriss v. Pan American World Airways, Inc., 437 F.Supp, 413, 434 (N.D. Cal. 1977), *aff'd in part and rev'd in part*, 649 F.2d 670 (9th Cir. 1980).

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[9] The House Report specifically warns against "strict application of general prohibitions":

> The case-by-case basis should serve as the underlying rule in the administration of the legislation. Too many different types of situations in employment occur for the strict application of general prohibitions and provisions. It is enough that the bill outlines a national policy against discrimination in employment on account of age, provides a vehicle for enforcement of the policy, and establishes broad guidelines for its implementation.

H.R. Rep. No. 805, 90th Cong., 1st Sess., reprinted in 1967 U. S. Code Cong. & Admin. News 2213, 2220.

Because passenger safety is of the utmost importance in the airline industry, the court in *Murnane, supra,* explained that the industry "must be accorded great leeway and discretion in determining the manner in which it may be operated *most safely*." 667 F.2d at 101 (emphasis in original) (citation omitted). Similarly, the court in *Harriss, supra,* explained that the "greater the safety factor, measured by the likelihood of harm and the probable severity of that harm in case of an accident, the more stringent may be the job qualification designed to insure safe [operation]." 649 F.2d at 676 (quoting *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 (5th Cir. 1976)). Where safety is an issue, therefore, the employer should not be put to an unduly high burden of proving its justification. *EEOC v. County of Santa Barbara,* 666 F.2d 373, 377 n. 9 (9th Cir. 1982) (correction officers); *Tuohy v. Ford Motor Co.*, 675 F.2d 842, 845 (6th Cir. 1982), (corporate pilots); *Hoefelman v. Conservation Comm'n of Missouri Dept. of Conservation,* 541 F.Supp. 272, 275 (W.D. Mo. 1982), *affirmed,* 718 F.2d 281 (8th Cir. 1983) (pilot for governmental agency).

Morever, "safe enough" is not a suitable standard; an air carrier must operate in the *highest possible* degree of safety. As the D.C. Circuit in *Murnane* explained, an airline's policy may be justified if it *might* result in only a marginal increase in the safety of its passengers—that is, the airline need show only that its policy *might* have resulted in the death of *one less person. Id.* at 100-01. A jury must not be permitted to find that a policy which effects only a minimal increase in safety is outweighed by the fact that many individuals may be precluded from pursuing their chosen occupation. *Id.* at 100. Even if a view as sensitive to safety concerns as that articulated in *Murnane* were not adopted, an airline surely should prevail on its ADEA § 4(f)(1) defense if it can demonstrate that it acted in good faith and had a rational basis for

believing that implementation of a policy might have resulted in the safer operation of its aircraft. Deference to an employer's judgments as to safety concerns is particularly appropriate when the judgments are made concerning subjects in which the employer possesses particular expertise. "Courts . . . do not possess the expertise with which, in a cause presenting safety as the critical element, to supplant their judgments for those of the employer." *Murnane v. American Airlines, Inc., supra* at 101.

In short, the § 4(f)(1) exception should be interpreted so as not to require an airline to experiment with the lives of its passengers. Given the horrible consequences of an aircraft accident, an airline must be permitted to utilize its expertise to manage risks by projecting what might occur as opposed to reacting to tragedy after it occurs. Indeed, the Supreme Court in *Dothard v. Rawlinson,* 433 U.S. 321, 335 (1977), applying Title VII, agreed that the employer must be permitted to project what might occur were it to permit female correction officers to be positioned near male prisoners who had committed violent crimes. Similarly, relying on its expertise, an airline must be permitted to project what might happen in situations with which it has had no previous experience, such as that encountered here—an airman serving in the cockpit past the age of sixty.

A narrow, rigid application of the § 4(f)(1) exception in ADEA cases is clearly contrary to the intent of Congress. The presence of safety concerns in a particular business decision calls out for flexibility. In order to insure that the costs of ADEA enforcement will not be paid in human safety terms, reasonable employment policies with age-related effects should be permitted. And, as the magnitude of the potential harm increases, employers must be given greater latitude in implementing judgments concerning safety in areas where they are the

experts. This is not to say that purely speculative and unsubstantiated discrimination against the protected class of employees is to be tolerated. The good faith of the employer and rationality of safety-based policies can certainly be tested. But airlines must be permitted, and indeed encouraged, to err on the side of safety without facing the prospect of potentially crippling liability to a class of employees.

CONCLUSION

For the foregoing reasons, Pan Am respectfully urges that the decision below be reversed.

Dated: November 14, 1984

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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No. 83-1545

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WESTERN AIR LINES, INC.,
Petitioner,
v.
CHARLES G. CRISWELL, ALBERT RON and RULON H. STARLEY,
Respondents.

WESTERN AIR LINES, INC.,
Petitioner,
v.
WESTCOT B. STONE, III, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONER

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29 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS CURIAE	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. THE COURT OF APPEALS ERRED IN REQUIRING THE EMPLOYER IN AN ACTION UNDER THE ADEA TO PROVE AS AN AFFIRMATIVE DEFENSE THAT ITS ACTIONS WERE BASED ON "REASONABLE FACTORS OTHER THAN AGE", RATHER THAN MERELY TO ARTICULATE "REASONABLE FACTORS OTHER THAN AGE" IN ACCORDANCE WITH *BURDINE* AND *McDONNELL DOUGLAS*	6
A. The *Burdine* And *McDonnell Douglas* Burden Of Proof Scheme Provides A Logical Method To Evaluate The Evidence In Employment Discrimination Cases	6
B. The Lower Courts Normally Have Applied The *Burdine* And *McDonnell Douglas* Proof Scheme In ADEA Cases	9
C. There Is No Persuasive Reason Why The *Burdine* And *McDonnell Douglas* Proof Scheme Should Not Be Applied To A "Reasonable Factors Other Than Age" Defense	11
II. THIS COURT SHOULD FASHION A REASONABLE BFOQ STANDARD THAT GIVES SUFFICIENT DEFERENCE TO AN EMPLOYER'S DECISION TO IMPOSE AN AGE LIMITATION IN A MANNER CONSISTENT WITH THE SAFE AND EFFICIENT OPERATION OF ITS BUSINESS	17
CONCLUSION	24

TABLE OF AUTHORITIES

Cases: Page

Arritt v. *Grisell*, 567 F.2d 1267 (4th Cir. 1977) 17, 18
Bittar v. *Air Canada*, 512 F.2d 582 (5th Cir. 1975) .. 13
Blackwell v. *Sun Elec. Corp.*, 696 F.2d 1176 (6th Cir. 1983) 10
Board of Trustees v. *Sweeney*, 439 U.S. 24 (1978) .. 7
Cova v. *Coca-Cola Bottling Co.*, 574 F.2d 958 (8th Cir. 1978) 9
Diaz v. *Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971) 19
Dothard v. *Rawlinson*, 433 U.S. 321 (1977) 17
Douglas v. *Anderson*, 656 F.2d 528 (9th Cir. 1981) 11
EEOC v. *County of Santa Barbara*, 666 F.2d 373 (9th Cir. 1982) 22
EEOC v. *U. of Texas Health Science Center*, 710 F.2d 1091 (5th Cir. 1983) 19
EEOC v. *Wyoming*, 103 S. Ct. 1054 (1983) 17, 18, 20, 23
Furnco Construction Corp. v. *Waters*, 438 U.S. 567 (1978) 2, 7, 8, 9, 13, 14, 15
Garner v. *Boorstin*, 690 F.2d 1034 (D.C. Cir. 1982) 9
Gathercole v. *Global Associates*, 727 F.2d 1485 (9th Cir. 1984) 24
General Electric Co. v. *Gilbert*, 429 U.S. 125 (1976) 16
Hagelthorn v. *Kennecott Corp.*, 710 F.2d 76 (2d Cir. 1983) 10
Hodgson v. *Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975) 22, 23
International Brotherhood of Teamsters v. *United States*, 431 U.S. 324 (1977) 2
Johnson v. *Mayor and City of Baltimore*, 731 F.2d 209 (4th Cir. 1984) 24
Kenroti v. *Frontier Airlines, Inc.*, 585 F.2d 967 (10th Cir. 1978) 9

TABLE OF AUTHORITIES—Continued

Page

Kephart v. *Institute of Gas Technology*, 630 F.2d 1217 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981) 9
Krieg v. *Paul Revere Life Ins. Co.*, 718 F.2d 998 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 1712 (1984) 9
Little v. *Texaco, Inc.*, 456 F.2d 219 (10th Cir. 1972) 14
Loeb v. *Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979) 9, 12, 13, 15, 16
Lorillard v. *Pons*, 434 U.S. 575 (1978) 2, 10
Maki v. *Commissioner of Educ. of State of N.Y.*, 568 F. Supp. 252 (N.D.N.Y. 1983) 22
Marshall v. *Westinghouse Elec. Corp.*, 576 F.2d 588 (5th Cir. 1978) 11, 12
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) ..... *passim*
Murnane v. *American Airlines, Inc.*, 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982) 21
Orzel v. *City of Wauwatosa Fire Dep't.*, 697 F.2d 743 (7th Cir.), *cert. denied*, 104 S. Ct. 484 (1983) 17, 19, 21, 23
Price v. *Maryland Casualty Co.*, 561 F.2d 609 (5th Cir. 1977) 9
Shell Oil Co. v. *Dartt*, 434 U.S. 99 (1977) 2
Smallwood v. *United Air Lines, Inc.*, 661 F.2d 303 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982) 17
Smith v. *Farah Mfg. Co., Inc.*, 650 F.2d 64 (5th Cir. 1981) 12
Smith v. *University of North Carolina*, 632 F.2d 316 (4th Cir. 1980) 9
Smithers v. *Bailar*, 629 F.2d 892 (3d Cir. 1980) 9
Stanojev v. *Ebasco Services, Inc.*, 643 F.2d 914 (2d Cir. 1981) 9
Stewart v. *Smith*, 673 F.2d 485 (D.C. Cir. 1982) 19
Sutton v. *Atlantic Richfield Co.*, 646 F.2d 407 (9th Cir. 1981) 9

TABLE OF AUTHORITIES—Continued

	Page
Texas Department of Community Affairs v. *Burdine*, 450 U.S. 248 (1981)	*passim*
Trans World Airlines, Inc. v. *Thurston*, Nos. 83-997 and 83-1325	2
Tuohy v. *Ford Motor Co.*, 675 F.2d 842 (6th Cir. 1982)	21
Usery v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976)	18, 19, 20, 23
Weeks v. *Southern Bell Telephone and Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969)	19
Statutes:	
Age Discrimination in Employment Act	
29 U.S.C. § 621, *et seq.*	2
Section 623(f)	11, 13, 17, 18
Title VII of the Civil Rights Act of 1964	
42 U.S.C. § 2000e, *et seq.*	6
Rules and Regulations:	
Fed. R. Evid. 301	8
Fed. R. Civ. P. 8(e)	14
14 C.F.R. § 121.383(c)	3
29 C.F.R. § 1625.7(e)	15, 16
46 Fed. Reg. 47724	16
Miscellaneous:	
2A Moore's Federal Practice	14
Smith & Leggette, Recent Issues in Litigation Under the Age Discrimination in Employment Act, 41 Ohio St. L. J. 349 (1980)	13

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---

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONER

This brief amicus curiae of the Equal Employment Advisory Council ("EEAC") is submitted with the consent of the parties[1] in support of the petitioner.

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the

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[1] Their consents have been filed with the Clerk of the Court.

general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership consists of a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity (EEO) whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* (the "ADEA"), as well as other equal employment statutes and regulations. As such, they have a direct interest in the issues presented for the Court's consideration in the instant case—i.e., the standards for establishing the "reasonable factors other than age" (RFOA) and "bona fide occupational qualification" (BFOQ) defenses under the ADEA.

Because of its interest in issues arising under the ADEA, the Council has participated as amicus curiae in a number of cases in this Court involving the interpretation and enforcement of the ADEA. *See, e.g., Trans World Airlines, Inc.* v. *Thurston*, Nos. 83-997 and 83-1325; *Lorillard* v. *Pons*, 434 U.S. 575 (1978); *Shell Oil Co.* v. *Dartt*, 434 U.S. 99 (1977). In addition, EEAC has filed briefs as amicus curiae on numerous other occasions in this Court. *See, e.g., Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981); *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978); *Int'l Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977).

STATEMENT OF THE CASE

This case was brought under the ADEA by a number of pilots and flight engineers who sought to continue working as flight engineers past age 60, but who were involuntarily retired at age 60. Western employs flight crew members as captains, first officers and second officers. The captains and first officers actually fly the aircraft, whereas second officers perform flight engineer functions relating to a variety of systems necessary to the safe operation of the aircraft.

Since 1960, a regulation of the Federal Aviation Administration (FAA) has prohibited commercial airline pilots from working past their sixtieth birthday. *See* 14 C.F.R. § 121.383(c). Although this mandatory regulation does not apply to flight engineers, because of safety concerns similar to those underlying the FAA regulation, Western adpoted an age 60 limitation on flight engineers as well.

In 1977, at the age of 59, Captains Criswell and Starley attempted to "downbid" to the position of flight engineer pursuant to the collectively bargained pilot agreement with the Airline Pilots Association (ALPA), which represented the pilots. The "downbids" were rejected by Western based on its belief that such "downbids" were not authorized by the pilot agreement. Both pilots grieved the denials to the Western Air Lines Pilots System Board of Adjustment, which upheld Western's interpretation of the terms of the agreement and denied the grievances. Also in 1977, Captains Criswell and Starley and career Second Officer Ron informed Western that they desired to work as Second Officers past their sixtieth birthdays. All three were told that they would be retired at age 60.

In June 1978, Criswell, Starley and Ron filed suit seeking to prevent Western from retiring them at age

60. After a trial, the jury returned verdicts awarding substantial damages to each of the plaintiffs. Following the jury verdict, the district court issued findings and conclusions in a memorandum opinion reported at 514 F. Supp. 384 and entered judgment for the plaintiffs (Appendix to Petition for a Writ of Certiorari at 54) (hereinafter "A"). In *Stone*, the district court gave collateral estoppel effect to its *Criswell* decision in granting preliminary relief continuing a Second Officer in a flight engineer position past age 60. *See* A-95 and 544 F. Supp. 33.

The Ninth Circuit, in an opinion reported at 709 F.2d 544, upheld the district court's jury instruction that Western was required to prove as an affirmative defense that its refusal to allow Criswell and the other pilots to continue working as flight engineers past age 60 was based on "reasonable factors other than age." In doing so, the court noted that "[t]he 'reasonable factors' defense appears alongside the BFOQ exception in the ADEA (citation omitted) and is an affirmative defense for which the employer bears the burden of proof." 709 F.2d at 552.

With regard to Western's BFOQ defense, the Ninth Circuit affirmed the lower court's rejection of Western's proffered jury instruction that would have permitted the jury to sustain the BFOQ defense if Western had "a rational basis in fact for believing" the BFOQ to be appropriate. 709 F.2d at 549-51. In doing so, the Ninth Circuit rejected Western's argument that the lower court's instruction did not give sufficient deference to the employer's business decision based on its safety concerns and had the effect of requiring Western to prove the truth of the BFOQ elements, not merely that it had "a rational basis in fact for believing" those elements.

SUMMARY OF ARGUMENT

An employer meets its burden of rebutting a prima facie case of age discrimination by articulating "reasonable factors other than age" (RFOA). The employer is *not* required to prove, as an affirmative defense, that its actions were based on "reasonable factors other than age."

In *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), this Court established a three-step process for proving unlawful discrimination which has generally been adopted in employment discrimination cases. Under that process, the plaintiff has the initial burden of establishing a prima facie case; the defendant then must rebut the prima facie case by articulating a nondiscriminatory reason; and the plaintiff then must prove that the defendant's proffered reason was a pretext for discrimination. The overwhelming weight of lower court decisions supports the application of *Burdine* and *McDonnell Douglas* v. *Green*, 411 U.S. 792 (1973), standards to cases brought under the ADEA.

The decision of the lower court treating the RFOA defense as an affirmative defense is inconsistent not only with the prevailing practice in lower court decisions in ADEA cases not asserting RFOA defenses, but also with the better-reasoned lower court decisions that have applied the *Burdine* analysis to RFOA defenses. There is no persuasive reason for not applying the *Burdine* analysis to an RFOA defense.

The ADEA recognizes that an employer may impose limitations expressly based on age where age is a bona fide occupational qualification (BFOQ) reasonably necessary to the job in question. The standard adopted by the lower court, however, fails to afford sufficient deference to an employer's decision to impose age limitations where safety is of paramount concern.

Numerous lower courts have recognized that where an overriding safety factor exists, employers should be given substantially greater discretion in setting age-based restrictions. Similarly, a number of lower courts have noted that the presence of a paramount safety factor minimizes the level of proof required to establish a BFOQ.

Any standard adopted by this Court for demonstrating a BFOQ should recognize that where safety is an overriding consideration, the burden of establishing a BFOQ should be less. In addition, any BFOQ test should recognize the extreme difficulty of proving to a legal certainty a BFOQ defense as it has been applied in the lower courts. Finally, any standard adopted by this Court should clearly acknowledge that employers should be given a reasonable degree of deference to adopt age-based limitations where those decisions are based on a well-founded belief that an elimination of the age restriction would result in an increase in the likelihood of risk to its employees, those using its services, or others.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN REQUIRING THE EMPLOYER IN AN ACTION UNDER THE ADEA TO PROVE AS AN AFFIRMATIVE DEFENSE THAT ITS ACTIONS WERE BASED ON "REASONABLE FACTORS OTHER THAN AGE", RATHER THAN MERELY TO ARTICULATE "REASONABLE FACTORS OTHER THAN AGE" IN ACCORDANCE WITH *BURDINE* AND *McDONNELL DOUGLAS*.

A. The *Burdine* And *McDonnell Douglas* Burden Of Proof Scheme Provides A Logical Method To Evaluate The Evidence In Employment Discrimination Cases.

In *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), this Court held that in an action brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, an employer can

rebut a plaintiff's prima facie case of discrimination by "explaining clearly the nondiscriminatory reasons for its actions." *Id.* at 260. The court of appeals' decision below is contrary to the logic of *Burdine* and the numerous lower court decisions that have applied *Burdine* in cases under the ADEA. Since there is no persuasive reason for not applying the rationale of *Burdine* to the ADEA, it is submitted that the decision of the Ninth Circuit herein should be reversed and this Court should hold that an employer does not bear the burden of proving, as an affirmative defense, that its actions were based on "reasonable factors other than age."

In *Burdine*, this Court clarified the burdens of proof under Title VII in individual disparate treatment cases. In such cases, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." 450 U.S. at 253. Upon the establishment of a prima facie case, the burden of production shifts to the employer to rebut the inference of discrimination by articulating a legitimate, nondiscriminatory reason for the employment action challenged by the plaintiff. *Id.* at 254; *Furnco Construction Co.* v. *Waters*, 438 U.S. 567, 577-78 (1978); *McDonnell Douglas Corporation* v. *Green*, 411 U.S. 792, 802 (1973). It is not necessary for the employer to prove the absence of a discriminatory motive in order to rebut the prima facie case, *Board of Trustees* v. *Sweeney*, 439 U.S. 24, 25 (1978); the employer's evidence merely must raise "a genuine issue of fact as to whether it discriminated against the plaintiff." *Burdine*, 450 U.S. at 254-55. While the establishment of a prima facie case creates a rebuttable presumption that the employer discriminated against the plaintiff, *id.* at 254 and n.7, this presumption must *not* be equated with an ultimate factual finding of discriminatory treatment. *Furnco*, 438 U.S. at 579. In most disparate treatment cases, the employer's defense consists of evidence that is offered in whole or in part to

rebut the inference of intentional discrimination by articulating nondiscriminatory reasons for the employer's actions.

Where the employer is able to meet its burden of articulating a legitimate, non-discriminatory reason for its action, the burden shifts back to the plaintiff "to demonstrate that the proffered reason was not the true reason for the employment decision." *Burdine*, 450 U.S. at 256; *McDonnell Douglas*, 411 U.S. at 804-05. This burden of demonstrating that the proffered reason of the employer was a pretext for unlawful discrimination merges with the plaintiff's ultimate burden of persuading the court that he has been a victim of intentional discrimination. *Burdine*, 450 U.S. at 256.

It is clear that this Court's allocation of the burden of proof in *Burdine* and *McDonnell Douglas* was not limited to Title VII cases. Rather, "[t]his evidentiary relationship between the presumption created by a prima facie case and the consequential burden of production placed on the defendant is a *traditional feature of common law.*" *Burdine*, 450 U.S. at 255 n.8 (emphasis added); *see also Fed. R. Evid.* 301.[2] As this Court noted in *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 577 (1978), "[t]he method suggested in *McDonnell Douglas* . . . is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination."

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[2] Rule 301 of the Federal Rules of Evidence provides as follows:

> In all actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

B. The Lower Courts Normally Have Applied The *Burdine* And *McDonnell Douglas* Proof Scheme In ADEA Cases.

The overwhelming weight of lower court decisions support the application of *Burdine* and *McDonnell Douglas* standards to cases brought under the ADEA. *See e.g., Garner* v. *Boorstin*, 690 F.2d 1034, 1036-37 (D.C. Cir. 1982); *Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1014-16 (1st Cir. 1979); *Stanojev* v. *Ebasco Services, Inc.*, 643 F.2d 914, 920 (2d Cir. 1981); *Smithers* v. *Bailar*, 629 F.2d 892, 894-95 (3d Cir. 1980); *Smith* v. *University of North Carolina*, 632 F.2d 316, 332-33 (4th Cir. 1980); *Price* v. *Maryland Casualty Co.*, 561 F.2d 609, 612 (5th Cir. 1977); *Kephart* v. *Institute of Gas Technology*, 630 F.2d 1217, 1219 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981); *Cova* v. *Coca-Cola Bottling Co.*, 574 F.2d 958, 959 (8th Cir. 1978); *Sutton* v. *Atlantic Richfield Co.*, 646 F.2d 407, 411 (9th Cir. 1981); *Kentroti* v. *Frontier Airlines, Inc.*, 585 F.2d 967, 969 (10th Cir. 1978); *Krieg* v. *Paul Revere Life Ins. Co.*, 718 F.2d 998, 999 (11th Cir. 1983), *cert denied*, 104 S. Ct. 1712 (1984). While these cases differ inconsequentially in their precise application of the *Burdine* analysis, they all adopt the three-step process—plaintiff's establishment of a prima facie case, defendant's rebuttal of the prima facie case by articulating a nondiscriminatory reason, and plaintiff's opportunity to demonstrate that the defendant's proferred reason was a pretext for unlawful discrimination—that has become fundamental to employment discrimination litigation. In *Loeb* v. *Textron*, 600 F.2d at 1015, the First Circuit noted that "we see no inherent reason why [the *McDonnell Douglas* analysis] is any less a 'sensible, orderly way to evaluate the evidence' [quoting *Furnco*, 438 U.S. at 577] in an age discrimination case than in any other."

The logic of applying the *Burdine* and *McDonnell Douglas* analysis to ADEA cases is underscored by the

similarities between Title VII and the ADEA. As this Court observed in *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978), "the prohibitions of the ADEA were derived *in haec verba* from Title VII." In *Lorillard*, this Court also commented on the "important similarities between the two statutes . . . both in their aims—the elimination of discrimination from the work-place—and in their substantive provisions." *Id.* at 872. Accordingly, there are substantial reasons for applying the same standards of proof under the ADEA as are applied under Title VII.

The logical three-step burden of proof scheme set forth in *Burdine* and *McDonnell Douglas* is not limited to instances where a plaintiff attempts to prove discrimination by an inferential process. As the Sixth Circuit noted in *Blackwell* v. *Sun Elec. Corp.*, 696 F.2d 1176, 1180 (6th Cir. 1983):

> The plaintiff can establish a prima facie case of age discrimination by using the *McDonnell Douglas* criteria. The plaintiff can also establish a prima facie case using statistical information, direct evidence of discrimination, and circumstantial evidence of discrimination other than that which is used in the *McDonnell Douglas* criteria. (Citation omitted). Once a prima facie case is established through either of these methods, the burden shifts to the employer to produce a legitimate non-discriminatory reason for his decision. The ultimate burden of proving discrimination also remains with the plaintiff.

Other lower courts properly have applied the same three-step burden of proof scheme where the plaintiff produced direct evidence of age discrimination. *See, e.g.*, *Hagelthorn* v. *Kennecott Corp.*, 710 F.2d 76, 81 (2d Cir. 1983). Thus, it is well established that the *Burdine* and *McDonnell Douglas* three-step burden of proof scheme normally is appropriate in ADEA cases. There is no persuasive reason why such a scheme also is not

available where an employer offers a defense based on "reasonable factors other than age" (RFOA).

C. There Is No Persuasive Reason Why The *Burdine* And *McDonnell Douglas* Proof Scheme Should Not Be Applied To A "Reasonable Factors Other Than Age" Defense.

The Ninth Circuit herein, without any detailed discussion of the *Burdine* and *McDonnell Douglas* burden of proof schemes and in apparent contradiction to its prior decisions,[3] held that "[t]he 'reasonable factors' defense appears alongside the BFOQ exception in the ADEA, 29 U.S.C. § 623(f),[4] and is an affirmative defense for which the employer bears the burden of proof." 709 F.2d at 552. In doing so, the Ninth Circuit erred by placing the burden of proof of the RFOA on Western, in contravention of the well established and prevailing scheme of proof in ADEA cases, as outlined above. The decision of the Ninth Circuit, treating the "reasonable factors other than age" defense as an affirmative defense, is inconsistent not only with the prevailing practice under lower court decisions in ADEA cases not asserting RFOA defenses, but also with the better-reasoned lower court decisions that have applied the *Burdine* analysis to RFOA defenses.

In *Marshall* v. *Westinghouse Elec. Corp.*, 576 F.2d 588, 590 (5th Cir. 1978), the Fifth Circuit noted that

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[3] *See, e.g., Douglas* v. *Anderson*, 656 F.2d 528, 533 (9th Cir. 1981).

[4] 29 U.S.C. § 623(f) provides in pertinent part as follows:

> It shall not be unlawful for an employer, employment agency, or labor organization—
>
> (1) to take any action otherwise prohibited under [the sections specifying prohibited practices] where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business or where the differentiation is based on reasonable factors other than age.

"[t]his circuit has consistently held that once the plaintiff makes out . . . a prima facie case the defendant bears the burden of 'going forward' to demonstrate reasonable factors other than age for the plaintiff's discharge." In distinguishing the affirmative defense of a "bona fide occupational qualification" (BFOQ) from the RFOA defense, the court stated that:

> An age-related BFOQ permits an employer to admit that he has discriminated on the basis of age, but to avoid any penalty. Establishment of a BFOQ relating to age justifies an employer's violation of the heart of the ADEA, allowing him to apply a general exclusionary rule to otherwise statutorily protected individuals solely on the basis of class membership. The good cause and differentiating factor exceptions, on the other hand, are denials of the plaintiff's prima facie case. Plaintiff says that the employer fired him because of his age; employer replies in effect, not so, plaintiff was fired for excessive absences, general inability, or some other non-discriminatory reason. 576 F.2d at 591. (Footnote omitted).

Finally, the Fifth Circuit in *Westinghouse*, 576 F.2d at 592, stated that "[t]o require a defendant to prove that his differentiating factors other than age criteria were evenly applied to all similarly situated employees would require defendants to prove that the asserted cause was 'non-pretextual'", a requirement that is inconsistent with case law under the ADEA and Title VII, as noted above. *Accord*, *Loeb* v. *Textron*, 600 F.2d at 1012.

Similarly, in *Smith* v. *Farah Mfg. Co., Inc.*, 650 F.2d 64, 67 (5th Cir. 1981), the Fifth Circuit reiterated the burden of proof on the RFOA issue as follows:

> If an ADEA plaintiff succeeds in proving his prima facie case, the employer must adduce proof that the plaintiff was discharged for good cause or because of some reasonable factor other than age.

> (Citations omitted). However, only the burden of producing evidence shifts to the employer. After the defendant goes forward with evidence that the discharge was based on some reason other than age, the plaintiff still bears the burden of persuasion to establish a case of discrimination by a preponderance of the evidence.

See also Bittar v. *Air Canada*, 512 F.2d 582, 582-83 (5th Cir. 1975).

In *Loeb* v. *Textron*, 600 F.2d at 1015-16, the First Circuit rejected the argument that the RFOA defense should be treated differently because it finds no parallel provision in Title VII. In doing so, the First Circuit noted that:

> The . . . provision, that older persons may be treated differently for reasons other than age, 29 U.S.C. § 623(f)(1) . . . does not repudiate the *McDonnell Douglas* approach. In § 623(f)(1) to be sure, Congress made plain that the age statute was not meant to prohibit employment decisions based on factors that sometimes accompany advancing age, such as declining health or diminished vigor and competence. But as *McDonnell Douglas* is merely "a sensible, orderly way to evaluate the evidence in light of common experience", *Furnco*, 438 U.S. at 577, 98 S. Ct. at 2949, it affords ample scope for the operation of the provision.[5]

The reasoning of the First Circuit on this issue is persuasive and supports the application of the *Burdine* and *McDonnell Douglas* proof scheme to cases where an RFOA defense is raised.[6]

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[5] This Court cited *Loeb* with apparent approval in *Burdine*, 450 U.S. at 252, 258, 259.

[6] Applying the *Burdine* and *McDonnell Douglas* standard to an RFOA defense also is consistent with the views of commentators on the ADEA. *See, e.g.*, Smith & Leggette, Recent Issues in Litigation Under the Age Discrimination in Employment Act, 41 Ohio St. L.J. 349, 380 (1980).

The appropriateness of applying the *Burdine* and *McDonnell Douglas* analysis to an RFOA defense is consistent with Western's defenses raised in the instant case. Western raised two primary defenses, among others, to the age discrimination claims below. First, it asserted that its alleged unlawful actions were based on "reasonable factors other than age," in this case its reliance on its collective bargaining agreement with ALPA and the decision of the Western Air Lines Pilots System Board of Adjustment. The decision of the Board of Adjustment upheld Western's interpretation of the terms of the agreement that "downbids" to flight engineer positions were not authorized by the agreement. Thus, it is clear that for purposes of its RFOA defense, Western did *not* admit that it discriminated on the basis of age. Alternatively, Western maintained that its policy of prohibiting flight engineers from working past age 60 was a BFOQ.

Western, of course, was perfectly free to plead and attempt to prove, as it did, alternative and even inconsistent defenses. *See*, Fed. R. Civ. P. 8(e); 2A Moore's Federal Practice ¶ 8.31-8.32 and cases cited therein; *id.* at 8-296 ("The fact that affirmative defenses are inconsistent with denials is not fatal. Defendant will not be required to elect between defenses"); *Little* v. *Texaco, Inc.*, 456 F.2d 219, 220 (10th Cir. 1972). Because Western, for purposes of its RFOA defense, did *not* admit that it discriminated on the basis of age, there is no basis for concluding, as the United States does in its brief amicus curiae on the petition for a writ of certiorari at pages 10-14, that the present case "involves an affirmative RFOA defense, rather than a mere 'denial' defense". *Id.* at 13. To accept such an argument would be to equate a plaintiff's prima facie showing with the equivalent of a factual finding of discrimination, an approach rejected by this Court in *Furnco*, 438 U.S. at 579. Since this approach *presumes*, based only

on a prima facie showing, the very fact of discrimination that the *Burdine* and *McDonnell Douglas* approach is designed to determine, it is inconsistent with *McDonnell Douglas*, *Burdine* and *Furnco* and imposes on the defendant a burden of proof that has been rejected in those cases.

In its amicus curiae brief, the United States also maintained that the decision of the court of appeals was "in accordance with the EEOC's interpretations of the ADEA, which require an employer to *prove* the existence of any reasonable factor other than age alleged to be responsible for a differentiation between older and younger workers. 29 C.F.R. 1625.7(e)." Brief for the United States as Amicus Curiae at p. 11. (Emphasis added).[7] Thus, the United States relies on 29 C.F.R. § 1625.7(e), yet at the same time seeks to undercut the application of the reasoning of the First Circuit's decision in *Loeb* v. *Textron*, 600 F.2d 1003, to the instant case by stating that *Loeb* "involve[d] individual claims of discrimination, where the employer merely denies that a particular personnel action was taken for a discriminatory reason." Brief, at 12.

The United States' reliance on the EEOC regulation and its attempt to limit the holding in *Loeb* are unavailing for two reasons. First, the EEOC regulation places on the employer only the burden of "showing" that the RFOA defense exists factually. It is not at all clear that this burden was intended to be any different than the *Burdine* and *McDonnell Douglas* burden of "articulating" a nondiscriminatory reason. Second, the attempt to embrace the EEOC regulation as mandating that the RFOA

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[7] 29 C.F.R. § 1625.7(e) provides in pertinent part as follows:

> When the exception of "a reasonable factor other than age" is raised against an individual claim of discriminatory treatment, the employer bears the burden of *showing* that the "reasonable factor other than age" exists factually. (Emphasis added).

be treated as an affirmative defense is undermined by EEOC's own citation of *Loeb* v. *Textron* in the introduction of its final regulations. In that introduction, the Commission stated that:

> Paragraph (e) of § 1625.7 has been modified to clarify its initial intent that when the defense of "a reasonable factor other than age" is raised against an individual claim of discriminatory treatment, the employer bears the burden of showing that the "reasonable factor other than age" exists factually. *Loeb* v. *Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979). 46 Fed. Reg. 47724, 47725.

Since, as set forth above, *Loeb* applied the traditional *Burdine* and *McDonnell Douglas* test to the RFOA defense, the EEOC regulations, if anything, support an application of that test to the RFOA defense. At a minimum, the inconsistency between the position now asserted by the United States and that apparently held at the time of the publication of the final regulations mandates that the current interpretation not be accorded the deference that agency interpretations normally are entitled to. *See General Electric Co.* v. *Gilbert*, 429 U.S. 125, 140-42 (1976).

Thus, it is clear that an application of the traditional *Burdine* and *McDonnell Douglas* standards to the RFOA defense is consistent with the use of presumptions in civil cases generally, with the previous decisions of this Court and with the better-reasoned lower court decisions. Accordingly, it is submitted that this Court should hold that an employer in an ADEA case bears only the burden of going forward with the evidence to demonstrate an RFOA defense.

II. THIS COURT SHOULD FASHION A REASONABLE BFOQ STANDARD THAT GIVES SUFFICIENT DEFERENCE TO AN EMPLOYER'S DECISION TO IMPOSE AN AGE LIMITATION IN A MANNER CONSISTENT WITH THE SAFE AND EFFICIENT OPERATION OF ITS BUSINESS.

Under the ADEA, an employer may impose limitations expressly based on age where age is a BFOQ reasonably necessary to the job in question. 29 U.S.C. § 623(f)(1).[8] The ability of an employer to impose such age-related limitations is particularly important where the employer has legitimate concerns regarding the safety of its employees, those utilizing its services, or others. The standard for establishing a BFOQ defense adopted by the Ninth Circuit herein and by certain other lower courts, however, fails to afford sufficient deference to an employer's decision to impose age limitations that are reasonably necessary to the safe and efficient conduct of its business. Accordingly, it is submitted that this Court should formulate a standard for establishing a BFOQ defense that recognizes and allows for an employer to exercise a reasonable degree of discretion to adopt age limitations where safety is involved.

Since the BFOQ defense is an exception to the general statutory prohibition of age discrimination, a number of Courts have held that the exception is to be construed narrowly. *See, e.g., Orzel* v. *City of Wauwatosa Fire Dept.*, 697 F.2d 743, 748 (7th Cir.), *cert. denied*, 104 S. Ct. 484 (1983); *Smallwood* v. *United Air Lines, Inc.*, 661 F.2d 303, 307 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982); *cf. Dothard* v. *Rawlinson*, 433 U.S. 321, 334 (1977). Chief Justice Burger, in his dissenting opinion joined by Justices Powell, Rehnquist and O'Connor in *EEOC* v. *Wyoming*, 103 S. Ct. 1054 (1983), has

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[8] 29 U.S.C. § 623(f)(1) is set forth in pertinent part in footnote 4, above.

highlighted the problems that arise, however, where the BFOQ defense is construed too narrowly. In discussing the section of the ADEA containing the BFOQ defense, the Chief Justice stated that:

> Although superficially, this section appears to offer the states a means for lessening the administrative burden of retiring unfit employees on a case by case basis, the exception does not work in practice. In the absence of statutory guidelines, the courts that have faced the question have—in response to [EEOC's] urgings—established a high standard of what constitutes a bona fide occupational qualification. Typical seems to be the approach taken in *Arritt* v. *Grisell*, 567 F.2d 1267, 1271 (CA4 1977), requiring the employer to prove:
>
> > "(1) that the bfoq which it invokes is reasonably necessary to the essence of its business . . ., and (2) that the employer has reasonable cause, i.e., a factual basis for believing that all or substantially all persons within the class . . . would be unable to perform safely and efficiently the duties involved, or that it is impossible or impractical to deal with persons over the age limit on an individualized basis."
>
> See also *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224 (CA5 1976). Given the state of modern medicine, it is virtually impossible to prove that *all* persons within a class are unable to perform a particular job or that it is impossible to test employees on an individual basis. (Citation omitted).
>
> In the face of this track record, I find it impossible to say that § 623(f)(1) provides an adequate method for avoiding significant impairment to the state's ability to structure its integral governmental operations. 103 S. Ct. at 1071-72. (Footnote omitted).

The BFOQ standard in *Arritt* v. *Grisell*, criticized by the Chief Justice in *Wyoming*, was expressly adopted

from the Fifth Circuit's decision in *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976). The *Tamiami Trail* BFOQ standard was cited with approval by the Ninth Circuit herein, 709 F.2d at 550, 551, and has been followed by a number of other lower courts. *See, e.g., Orzel* v. *City of Wauwatosa Fire Dept.*, 697 F.2d at 753; *Stewart* v. *Smith*, 673 F.2d 485, 491 n.26 (D.C. Cir. 1982). The *Tamiami Trail* standard, developed in a case reviewing a trial to the court, has proved to be troublesome in its application by other courts to jury trials under the ADEA. Accordingly, it is critical that this Court, either through a clarification of the *Tamiami Trail* standard or through the adoption of a different standard, provide guidance to the lower courts regarding the degree of deference to be afforded employer's decisions to impose age limitations where safety is essential to its operations.[*]

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[*] The *Tamiami Trail* test was adopted in large measure from earlier Fifth Circuit decisions involving the BFOQ defense under Title VII. *See Diaz* v. *Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971); *Weeks* v. *Southern Bell Telephone and Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969). Judge Higginbotham, in his concurring opinion in *EEOC* v. *U. of Texas Health Science Center*, 710 F.2d 1091, 1097 (5th Cir. 1983), has cautioned against equating a BFOQ under the ADEA with a BFOQ under Title VII:

> I concur and write separately only to state candidly that our cases seem to be driven by at least three virtually sub rosa forces that make the requirements for proof of a bona fide occupational qualification under ADEA, while analogous in approach, not as exacting as those of Title VII. The first is inherent in the fact that race, sex and national origin describe an immutable status while age is a dynamic progression. Second and relatedly is the fact that we accept the factual and legal validity of using age as a prediction of certain physical and agility skills, the inquiry being largely correspondence between the specific age and the specific skill requirement, and we accept that age does so in such an efficient manner that its use is not necessarily suspect. Finally, the risk of error when public safety is proved to be actually implicated is resolved in favor of safety.

The jury instructions on the BFOQ issue approved by the Ninth Circuit herein, *see* 709 F.2d at 549, required Western "to prove", *id.*,:

> (1) that . . . it was highly impractical for Western to deal with each Second Officer over age 60 on an individualized basis to determine his particular ability to perform his job safely, and
>
> (2) that some Second Officers (flight engineers) over age 60 possess traits of physiological, psychological, or other nature which preclude safe efficient job performance that cannot be ascertained by means other than knowing their age.

The instruction approved by the Ninth Circuit herein was even more stringent than that given in *Tamiami Trail* and criticized by the Chief Justice in *Wyoming*. The Ninth Circuit instruction failed to include the "reasonable cause, i.e., a factual basis" language from *Tamiami Trail*, and required the employer *to prove both* that it was highly impractical to deal with Second Officers on an individual basis *and* that some Second Officers over age 60 possess traits that preclude safe job performance that cannot be ascertained by means other than their age. Moreover, as the Chief Justice pointed out in *Wyoming*, it is virtually impossible *to prove* that it is impractical or impossible to test employees on an individual basis. 103 S. Ct. at 1072. In addition, the instruction approved below failed explicitly to acknowledge, as other courts have, that a greater deference should be given to employer decisions to impose age-based restrictions where safety is of paramount concern.

Numerous lower courts have noted that where, as here, an overriding safety factor exists, employers should be given substantially greater discretion in setting age-based restrictions. Even in *Tamiami Trail*, 531 F.2d at 238, the Fifth Circuit recognized the importance of the safety factor when a BFOQ is alleged:

> We emphasize safety in busing just as we would in a variety of other industrial areas where safety to fellow employees is of such humane importance that the employer must be afforded *substantial discretion* in selecting specific standards which, if they err at all, *should err on the side of preservation of life and limb*. The employer must of course show a reasonable basis for its assessment of risk of injury/death. But it cannot be expected to establish this to a certainty, for certainty would require running the risk until a tragic accident would prove that the judgment was sound. (Emphasis added).

Similarly, in *Murnane* v. *American Airlines, Inc.*, 667 F.2d 98, 101 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982), the Court of Appeals for the District of Columbia Circuit observed that:

> [I]n our judgment, the airline industry must be accorded *great leeway and discretion* in determining the manner in which it may be operated *most* safely. (Citation omitted). This is in accord with American's view that "safe" is not sufficient. Rather, the "safest" possible air transportation is the ultimate goal. Courts, in our view, do not possess the expertise with which, in a cause presenting safety as the critical element, to supplant their judgments for those of the employer. (Emphasis added in second line).

In businesses where safety is of paramount concern, a number of courts have noted that the presence of an overriding safety factor minimizes the level of proof required to establish a BFOQ. *See, e.g., Orzel* v. *City of Wauwatosa Fire Dept.*, 697 F.2d at 755 ("[E]mployers whose businesses are safety-related are likely to have less difficulty than other employers in establishing that *some* retirement age below the federally protected limit of 70 qualifies as a valid BFOQ"); *Tuohy* v. *Ford Motor Co.*, 675 F.2d 842, 845 (6th Cir. 1982) ("The presence of an overriding safety factor might well lead a court to conclude as a matter of policy that the level of proof

required to establish the reasonable necessity of a BFOQ is relatively low"); *EEOC* v. *County of Santa Barbara*, 666 F.2d 373, 377 (9th Cir. 1982) ("[E]mployers whose businesses are safety-related have less difficulty proving that age is a BFOQ"); *Maki* v. *Commissioner of Educ. of State of N.Y.*, 568 F. Supp. 252, 254 (N.D. N.Y. 1983).

In *Hodgson* v. *Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975), the Seventh Circuit, in rejecting a challenge to Greyhound's maximum hiring age for intercity bus drivers, expressly acknowledged that it was not necessary to prove to a certainty that the elimination of its age limitation would result in risk of harm to its passengers. In doing so, the court stated that:

> Due to . . . compelling concerns for safety, it is not necessary that Greyhound show that all or substantially all bus driver applicants over forty could not perform safely. Rather, to the extent that the elimination of Greyhound's hiring policy may impede the attainment of its goal of safety, it must be said that such action undermines the essence of Greyhound's operation. Stated differently, Greyhound must demonstrate that it has a rational basis in fact to believe that elimination of its maximum hiring age will increase the likelihood of risk of harm to its passengers. Greyhound need only demonstrate however a minimal increase in risk of harm for it is enough to show that elimination of the hiring policy might jeopardize the life of one more person than might otherwise occur under the present hiring practice. 499 F.2d at 863.

Similarly, the court observed that:

> Greyhound need not establish its belief to the certainty demanded by the Government and the district court for to do so would effectively require Greyhound to go so far as to experiment with the lives of passengers in order to produce statistical evidence pertaining to the capabilities of newly hired applicants forty to sixty-five years of age. Greyhound has amply demonstrated that its maximum hiring age policy is founded upon a good faith judgment concerning the safety needs of its passengers and others. It has established that its hiring policy is not the result of an arbitrary belief lacking in objective reason or rationale. 499 F.2d at 865.[10]

Based on the above discussion, it is submitted that any standard adopted by this Court for demonstrating a BFOQ should clearly recognize that where considerations of safety are concerned, there should be a lesser burden of establishing that a BFOQ is reasonably necessary to the business involved. While the importance that a paramount safety factor plays in evaluating the burden on an employer of establishing a BFOQ defense has been tacitly addressed, it should explicitly be made a part of any BFOQ test. In addition, any BFOQ test formulated by this Court should do so in recognition of the Chief Justice's observation in *Wyoming* that it is virtually impossible to prove to a legal certainty the elements of the BFOQ defense as it has developed and been applied in the lower courts. Finally, it is submitted that any BFOQ test developed by this Court should clearly recognize that the decisions of employers to impose age limitations must be given a reasonable degree of deference where those decisions are based on a well-founded belief or rational basis in fact that an elimination of its age limitation would increase the likelihood

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[10] In *Orzel* v. *City of Wauwatosa Fire Dept.*, 697 F.2d at 753, the Seventh Circuit read *Greyhound* as supporting a standard consistent with the *Tamiami* test. Given the difficulties that have arisen in applying the *Tamiami* test in jury trials under the ADEA, however, this later Seventh Circuit decision should not prevent this Court from looking to *Greyhound* for guidance in the instant case.

of risk to its employees, those utilizing its services, or others.[11]

Such an approach allows an employer to exercise its sound business judgment in a reasonable fashion and in a manner consistent with its concerns for the safe and efficient operation of its business. At the same time, the requirement that the employer must have a well-founded belief that an elimination of any age-based restrictions would increase the likelihood of risk to its passengers or others ensures that the BFOQ defense will not negate the intent of the ADEA of eliminating arbitrary age discrimination in the workplace.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Ninth Circuit herein should be reversed.

Respectfully submitted,

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[11] For example one way to identify where deference might be given is by references to instances where a government body itself has seen fit to impose age limitations. *See, e.g., Johnson* v. *Mayor and City of Baltimore*, 731 F.2d 209, 213 (4th Cir. 1984); *Gathercole* v. *Global Associates*, 727 F.2d 1485, 1488 (9th Cir. 1984).

AMICUS CURIAE

BRIEF

(9)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WESTERN AIR LINES, INC.,
Petitioner,

v.

CHARLES G. CRISWELL, ALBERT RON
and RULON H. STARLEY,
Respondents.

WESTERN AIR LINES, INC.,
Petitioner,

v.

WESTCOT B. STONE, III, *et al.*,
Respondents.

BRIEF FOR AMERICAN AIRLINES, INC. AS AMICUS CURIAE SUPPORTING REVERSAL

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TABLE OF CONTENTS

	Page
INTEREST OF AMERICAN AIRLINES	1
STATEMENT: AMERICAN'S AGE 60 BFOQ FOR PILOTS	3
SUMMARY OF ARGUMENT	8
ARGUMENT	9
I. Introduction—The Two Pronged BFOQ Standard	9
II. The BFOQ Standard Must Afford Each Airline Substantial Discretion To Select Job Qualifications That Are Reasonable In Light Of The Safety Risk	11
III. The BFOQ Standard Must Allow Each Airline To Impose A General Rule Where The Airline Has A Factual Basis For Its Determination That It Is Not Practical To Deal With Employees On An Individual Basis	14
IV. The BFOQ Standard Must Recognize Each Airline's Obligation To Maximize Safety	18
CONCLUSION	19

TABLE OF AUTHORITIES

CASES — Page

Condit v. United Air Lines, Inc., 558 F.2d 1176 (4th Cir. 1977) (per curiam), *cert. denied*, 435 U.S. 934 (1978) — 19

Criswell v. Western Air Lines, Inc., 709 F.2d 544 (9th Cir. 1983), *cert. granted*, 53 U.S.L.W. 3235 (U.S. Oct. 2, 1984) — 17, 19

Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971) — 9, 10

Dothard v. Rawlinson, 433 U.S. 321 (1977) — 17

EEOC v. County of Santa Barbara, 666 F.2d 373 (9th Cir. 1982) — 16

EEOC v. University of Texas Health Science Center, 710 F.2d 1091 (5th Cir. 1983) — 10, 14, 15

Hoefelman v. Conservation Commission of Missouri Department of Conservation, 718 F.2d 281 (8th Cir. 1983) — 16

Johnson v. American Airlines, Inc., No. CA-3-80-434-D (N.D. Tex. 1983), *aff'd* No. 83-1610, slip op. (5th Cir. Nov. 8, 1984) — 8, 17-18

Johnson v. American Airlines, Inc., No. 83-1610, slip op. (5th Cir. Nov. 8, 1984) — 2, 8, 12, 14, 15, 19

Levin v. Delta Air Lines, Inc., 730 F.2d 994 (5th Cir. 1984) — 12

Murnane v. American Airlines, Inc., 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982) — 2, 12, 18-19

Tuohy v. Ford Motor Co., 675 F.2d 842 (6th Cir. 1982) — 16

Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976) — 9, 11, 12

Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228 (5th Cir. 1969) — 9, 10, 15

STATUTE

49 U.S.C. § 1421(b) (1982) — 1, 18

REGULATION

14 C.F.R. § 121.383(c) (1984) — 6

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS — Page

Age Discrimination in Employment Act, Hearings on S. 830 and S. 788 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. 39 (1967) — 14

Age Discrimination in Employment Act, Hearings on H.R. 3651, H.R. 3768, and H.R. 4221 before the General Subcommittee on Labor of the House Committee on Education and Labor, 90th Cong., 1st Sess. 8 (1967) — 17

U.S. Department of Labor Report to the Congress on Age Discrimination in Employment under § 715 of the Civil Rights Act of 1965 — 17

113 Cong. Rec. 34,742 (Statement of Rep. Burke) — 17

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BRIEF FOR AMERICAN AIRLINES, INC. AS AMICUS CURIAE SUPPORTING REVERSAL

INTEREST OF AMERICAN AIRLINES

American Airlines, Inc. is a certificated air carrier which has a statutory duty under the Federal Aviation Act to operate with the "highest possible degree of safety in the public interest." 49 U.S.C. § 1421(b). American has established certain qualifications for its

pilots, including pilots who serve in the flight officer position, which it believes are necessary to fulfill that statutory duty. American has had to defend two of these qualifications under the Age Discrimination in Employment Act of 1967, as amended ("ADEA"). Accordingly, American has a substantial interest in the legal standards applied under the ADEA for the defense of job qualifications adopted by an airline pursuant to its duty to operate under the federal mandate to maximize safety.

Murnane v. American Airlines, Inc., 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982), involved American's general guideline against hiring persons over age 30 for the entry level pilot position of flight officer. In sustaining that policy as a BFOQ, the trial court and the court of appeals found that by limiting its new hiring to relatively young pilots, American is able to maintain a staff of captains which has the longest possible record of experience in American's cockpits, thus maximizing the safety of American's flight operations. *Johnson v. American Airlines, Inc.*, No. 83-1610, slip op. (5th Cir. Nov. 8, 1984), involved American's policy of not allowing pilots to serve as flight officers past age 60. The jury and the Fifth Circuit sustained that policy as a BFOQ on the basis of American's evidence that the policy enhances safety—both by facilitating the training of future captains and also by ensuring a crew command structure in which the captain is the most experienced pilot in the cockpit.

American supports the position of Western Air Lines that the trial court and the court of appeals committed error by imposing an erroneous BFOQ standard upon Western—a standard that would deprive airlines of any discretion in selecting job qualifications that they believe will enhance flight safety, a standard that would require airlines to prove to a certainty that flight personnel over a certain age cannot be dealt with on an

individual basis in order to impose a reasonable general rule, and a standard that would give no recognition to the airlines' federal obligation to maximize safety.[1]

STATEMENT: AMERICAN'S AGE 60 BFOQ FOR PILOTS

American's principal business is the safe transportation of passengers in interstate and international commerce. Most aircraft in American's fleet have three cockpit positions: captain, copilot, and third crew member.[2] The captain is in command of all aspects of the aircraft and its crew. The copilot is second in command and assists the captain in flying the aircraft. The third crew member is responsible for, among other things, monitoring the aircraft's fuel, electrical, hydraulic, and other systems during flight. He or she also observes and participates in American's cockpit procedures employed during flight.

Prior to the introduction of jet aircraft in the early 1960's, American hired only flight engineers to serve as third crew members. Those flight engineers were generally not pilots, but were often qualified mechanics. Their responsibilities included monitoring and sometimes repairing various systems on the aircraft. The flight engineers were represented in collective bargaining by the flight engineers' union, while the captains and copilots were represented by the pilots' union.

American began introducing jet aircraft into its fleet in the early 1960's. Those new jet aircraft were much

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[1] American also agrees with Western's position that the courts below erred in shifting the burden of persuasion to Western on the reasonable factors other than age defense. American will confine this brief, however, to the BFOQ issue.

[2] American's Boeing 727, Boeing 747, and DC-10 aircraft, which constitute the vast majority of American's fleet, utilize a third crew member. The Boeing 767 and DC-9 aircraft, a number of which were added to American's fleet after June of 1982, have only two cockpit crew members.

more complex and difficult to operate safely than propeller aircraft. This increased operational complexity contributed to American's losing six jet aircraft in accidents in the early 1960's. American also lost five other aircraft in accidents during this time, bringing its accident total to an alarming eleven aircraft in a relatively short period. American then determined, and it has since been reaffirmed, that pilot error is the principal cause of aircraft accidents.

Because of the high number of accidents, American decided to alter its pilot hiring and training methods in an attempt to achieve the highest possible degree of safety. For example, American centralized flight training in Dallas, Texas, improved teaching methods, and revised its flight manuals in order to achieve better and more uniform crew training. At the same time, American decided that thereafter it would hire only pilots for all cockpit positions, instead of hiring career flight engineers.[3] Since 1964, American has not hired any flight engineers. The new pilot-flight officers have been required to advance to copilot and, ultimately, to captain. American has hired its future captains to serve as flight officers so that they would spend a training period in the flight officer position, observing all aspects of American's cockpit procedures. American believes this period of familiarization with American's cockpit procedures is a very important training device to ensure that all of its cockpit crews operate American's way.

As part of its policy to hire only future captains, American implemented a strict "up or out" policy, which

[3] American entered into a "Tripartite Agreement" with the flight engineers' and the pilots' unions, under which American's existing flight engineers were permitted to remain in American's employ as third crew members on a separate, closed seniority list for professional flight engineers and under which all newly hired third crew members would be flight officers on the same pilot seniority list as American's captains and copilots.

requires pilots to train and qualify for the next highest cockpit position as called upon to do so in accordance with their seniority. If a pilot is unable to qualify in turn for the higher pilot category, he must either transfer to a non-cockpit position or be terminated. Moreover, if at any time a pilot becomes disqualified or otherwise unable for any reason to maintain his current pilot status or becomes incapable of progressing to the next highest pilot category, he must either transfer to a non-cockpit position or be terminated. American believes that its up or out and capable of progression policies result in highly motivated and proficient pilots eventually upgrading to the command position of captain.

A most desirable result of American's pilot hiring, up or out, and capable of progression policies is that the captain, who is in charge of all aspects of the flight, is the cockpit crew member with the most seniority and cockpit experience in American's aircraft. American has structured its policies and procedures around the premise that the pilot in command will be the leader in the cockpit and will not have his command shared in any respect with other members of the cockpit crew who have more seniority or experience than he. American does not use a committee approach to flying. Only one person is in charge, and that person is the captain.

In addition to the up or out and capable of progression policies, American has structured its pay incentives to ensure that all pilots will bid for and occupy the highest pilot seat for which they are qualified.[4] Of course, occasional business downturns resulting in cutbacks in flights will require that the least senior pilots in one category temporarily move down to the next lower category. The desired cockpit command structure remains intact in such situations, because the most sen-

[4] Copilots earn a maximum of approximately 69% of a captain's salary. Flight officers earn a maximum of approximately 60% of a captain's salary.

ior pilots will serve in the highest cockpit positions, while the most junior pilots will be forced to work in the lowest cockpit positions and sustain the accompanying cut in pay. American's system seeks to ensure that the captain will at all times be the most senior and experienced pilot and, thus, the undisputed leader in the cockpit.

Because of American's change in 1964 to hiring only future captains for its cockpit crews, two different types of employees perform the third crew member duties: professional flight engineers and pilot flight officers. Flight engineer is a "career" position at American; no American flight engineer has the right or the obligation to advance to the positions of copilot and captain. Flight officers, however, must advance in turn to the higher pilot categories and remain capable of doing so or face either transfer to a non-cockpit position or termination. No flight engineers have been hired since 1964. Eventually, all of American's third crew members will be flight officers.

American does not allow pilots to serve as flight officers upon their disqualification from serving as captain or copilot by a Federal Air Regulation promulgated by the Federal Aviation Administration in 1960, which precludes pilots from serving in such positions upon reaching age 60. 14 C.F.R. § 121.383(c) (the "Age 60 Rule"). American's policy provides that a pilot who is either not capable of continuing to serve or is not capable of progressing to serve as captain or copilot—for whatever reason, including the Age 60 Rule—must be transferred into some other line of work or be dismissed from the company's service. The remaining professional flight engineers, on the other hand, may continue to serve in their non-pilot occupation until age 70.

American has two primary reasons for its policy of not permitting pilots disqualified as captains and co-

pilots by the Age 60 Rule to serve as flight officers. First, American believes that if the senior, age 60 pilots were permitted to occupy the entry level flight officer seat, then American's system for training future captains would be severely degraded. American's up or out and capable of progression policies, which preclude any American pilot from being a career flight officer, prevent the blocking of the training seat. Because age 60 pilots are disqualified from advancing to higher pilot categories and would block the training seat, their requests to occupy the flight officer position are denied.

The second reason for precluding age 60 pilots from serving as flight officers pertains to American's crew command structure. American believes that permitting ex-captains disqualified by the Age 60 Rule to occupy the flight officer seat would endanger the safety of American's flights by creating, among other things, "role ambiguity" and uncertainty in the cockpit. As explained above, American's hiring, up or out, and capable of progression policies result in American cockpit crews which consist of a senior, experienced captain; a less senior, less experienced copilot; and a junior flight officer. The authority of the captain, who is required to make all critical decisions, is reinforced by the fact that he is the oldest crew member with the most experience. Therefore, there is no doubt about who is in charge, and, as American believes is necessary for safe flight operations, there is only one leader in the cockpit. In order to maintain its desired crew structure, American does not permit any captain, regardless of his age, to use his seniority to bid down to a flight officer's slot.

If ex-captains disqualified by the Age 60 Rule were allowed to bid down to the flight officer position, American's crew structure would be disrupted because the oldest, most experienced cockpit member would no longer be the captain, but instead would be the flight officer. American believes that a younger, less experienced cap-

tain could be intimidated or otherwise adversely affected by the presence of an over age 60 flight officer who used to be a senior, experienced American captain. American's belief is founded upon substantial expert opinion that disqualified captains serving as flight officers could create dangerous situations in the cockpit during emergency situations.

In *Johnson v. American Airlines, Inc.*, No. CA-3-80-434-D (N.D. Tex. 1983), the jury rendered a special verdict in June of 1983 finding that American's policy of not allowing pilots disqualified by the FAA's Age 60 Rule to serve as flight officers is justified as a BFOQ. The Fifth Circuit Court of Appeals affirmed the judgment on November 8, 1984. *Johnson v. American Airlines, Inc.*, No. 83-1610, slip op. (5th Cir. Nov. 8, 1984).

SUMMARY OF ARGUMENT

All certificated air carriers operate under a federal mandate to maximize safety. The essence of every airline's business is thus to provide the safest possible transportation. To accomplish that goal, every airline is in the business of avoiding and managing risks resulting from low probability occurrences which could have extremely serious consequences. Such risk management is essential to every airline's business, since aircraft accidents and incidents are invariably unique and low probability occurrences.

Nevertheless, no two air carriers operate exactly alike. Each has made its own determinations, based on its own experience, history, and good faith beliefs, regarding the safest modes of operation and the safest qualifications for its flight personnel. Every airline operates under the *minimum* safety standards of the Federal Air Regulations of the Federal Aviation Administration, but almost all airlines have safety standards that exceed FAA minimums in the quest for maximum safety of operation.

The BFOQ standard articulated by the trial court and endorsed by the court of appeals in this case is an alarming precedent for every airline. If the charge receives this Court's endorsement, the BFOQ standard of the ADEA will no longer accord airlines any discretion to select those qualifications for essential flight personnel that they believe will enhance safety, the BFOQ standard of the ADEA will no longer accord airlines the latitude to impose reasonable general rules where they have a factual basis for believing that they cannot deal with persons over a certain age on an individual basis, and the BFOQ standard of the ADEA will no longer assess whether job qualifications are "reasonably necessary" in the context of every airline's federal mandate to maximize safety. American believes that such a contraction of the BFOQ defense as applied to airline operations under the ADEA would disserve the public interest in airline safety, and would go far beyond the aim of the ADEA to avoid exclusion of older workers on the basis of stereotyped characterizations.

The judgment of he court of appeals is based upon an erroneous view of the BFOQ standard under the ADEA, and it should be reversed.

ARGUMENT

I. Introduction—The Two Pronged BFOQ Standard

In *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976), the United States Court of Appeals for the Fifth Circuit outlined a two-pronged standard for proving that a job qualification is reasonably necessary to the normal operation of the particular business, and thus a permissible BFOQ under the ADEA. The standard was based on two prior Title VII sex discrimination cases, *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971), and *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969).

Under the *Diaz* prong, the qualification must address "abilities that are *necessary* to the business, not merely tangential." *Diaz*, 442 F.2d at 389 (emphasis in original). Under the *Weeks* prong, the qualification must be founded upon a "reasonable cause to believe, that is, a factual basis for believing," that *either* most of the excluded persons lack those abilities *or* that it is not possible or practical to deal with such persons on an individual basis. *Weeks*, 408 F.2d at 235; *EEOC v. University of Texas Health Science Center*, 710 F.2d 1091, 1093 (5th Cir. 1983).

In *Weeks*, the earlier of the two cases, the Fifth Circuit rejected Southern Bell's claim that being female is a BFOQ for the occupation of switchman, because it was based merely upon the "stereotyped characterization" that few or no women can lift 30 pounds. 408 F.2d at 235-236. In *Diaz*, the Fifth Circuit ruled that being female is not a BFOQ for flight attendant, because the alleged superior abilities of females to perform the "non-mechanical functions of the job" are merely "tangential" to the airline's primary function of providing safe transportation. 442 F.2d at 388-389.

The two-pronged approach of *Tamiami*, while not prescribed by the ADEA or its legislative history, has generally been adopted by the other circuits and has evolved into a test that usually works, provided that the standard is properly applied by the trial court as trier of fact or properly articulated to the jury. In this case, however, the trial court's jury instruction on the BFOQ standard was erroneous on both prongs of the *Tamiami* standard. The instruction also failed to recognize the airline's federal mandate to operate with the highest possible degree of safety. The Ninth Circuit, moreover, ignored its own prior holdings as well as those of the other circuits in sustaining the trial court's BFOQ instruction.

II. The BFOQ Standard Must Afford Each Airline Substantial Discretion To Select Job Qualifications That Are Reasonable In Light Of The Safety Risk

Under the *Diaz* prong, the BFOQ defense is only available where the essence of the business operation would be weakened by not applying the qualification.[6] The duties of the position at issue must be reasonably necessary to the essence of the employer's business. "[T]he *Diaz* requirement of a correlation between the job description and the essence of the business operation is a condition precedent to the application of *Weeks*' BFOQ exception to the ban on hiring discrimination." *Tamiami*, 531 F.2d at 235 n.27.

In *Tamiami*, the Fifth Circuit held that the defendant "unquestionably satisfied the *Diaz* prong of the BFOQ test" by showing that its stringent job qualifications for bus drivers were related to the essence of the business and were "reasonable in light of the safety risk." *Tamiami*, 531 F.2d at 236. The court further stated that in the context of industries involving safety to passengers,

> the employer must be afforded substantial discretion in selecting specific standards which, if they err at all, should err on the side of preservation of life and limb. The employer must of course show a reasonable basis for its assessment of risk of injury/death. But it cannot be expected to establish this to a certainty, for certainty would require running the risk until a tragic accident would prove that the judgment was sound.

Tamiami, 531 F.2d at 238.

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[6] In *Diaz*, Pan Am had asserted a BFOQ defense for its policy of refusing to hire males as flight attendants. The Fifth Circuit held that the non-mechanical duties of a flight attendant, for which Pan Am sought to prove most males were unqualified, were not reasonably necessary to the safe transportation of passengers. Thus, Pan Am was precluded from justifying its sex discrimination as a BFOQ under *Weeks*. *Tamiami*, 531 F.2d at 235 n.27.

The "substantial discretion" standard of *Tamiami*'s articulation of the *Diaz* prong has been recently quoted with approval in *Levin v. Delta Air Lines, Inc.*, 730 F.2d 994, 997 (5th Cir. 1984). It has also been endorsed by the District of Columbia Circuit in *Murnane v. American Airlines, Inc.*, 667 F.2d 98, 101 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982):

> . . . the airline industry is one in which safety is of the utmost importance. The staggering death tolls and resulting human suffering which have followed some of our nation's horrible air disasters attest to this fact. Therefore, in our judgment, the airline industry must be accorded great leeway and discretion in determining the manner in which it may be operated *most* safely . . . . [citing *Tamiami*]

Accord, Johnson v. American Airlines, Inc., No. 83-1610, slip op. at 673 (5th Cir. Nov. 8, 1984) (quoting from *Murnane*).

Thus, where the purpose of an employment policy is to provide safe transportation and to minimize the risk of death or injury to passengers, the selection of the abilities and qualifications deemed necessary for safe and efficient job performance must in large measure be left to the reasonable judgment of the employer. The BFOQ standard not only must afford the employer substantial discretion in selecting safety standards, it must also afford the employer substantial discretion in judging the reasonableness of its own standards:

> We believe courts must afford employers substantial —though not absolute—discretion in selecting specific safety standards and in judging their reasonableness.

Tamiami, 531 F.2d at 236 n.30.[6]

[6] The substantial discretion accorded to the employer under the *Diaz* prong in selecting stringent job qualifications does not make the BFOQ exception any broader than necessary. Under *Diaz*, the employer must show that it has a reasonable basis for its assessment of the safety risks giving rise to the stringent job qualification. Moreover, once the *Diaz* prong is met, the employer must then prove that its belief—either that most persons over a certain age do not meet that stringent job qualification or that it is impractical to determine who does and who does not meet it—is founded upon a factual basis and not upon a stereotyped characterization concerning the ability of older workers.

The jury instruction in this case, however, accorded absolutely no discretion to Western to select its safety standards and to evaluate their reasonableness. Instead, the instruction invited a jury of laymen—with no knowledge or experience in flight safety—to substitute their judgment for that of Western. The *Diaz* prong of *Tamiami* was omitted; the jury was given no hint that the employer might have even a little discretion to choose among reasonable safety alternatives.[7]

The import of such a charge, if permitted to stand, is that juries will henceforth make the decisions of how an airline may be operated most safely. The fact is that there is no absolute truth in matters of aviation safety and that reasonable flight safety experts may differ in selecting job qualifications that are sufficiently safe. As long, however, as the specific standard chosen is reason-

[7] The failure of the instruction to accord deference to Western under the *Diaz* prong to select stringent job qualifications which it deemed necessary for safe and efficient job performance also tainted the instruction under the *Weeks* prong. Under *Weeks*, the jury should have been asked to assess whether Western had a factual basis for its belief that it is not possible or practical to determine which persons over 60 would meet its stringent job qualification—that is, would not have an increased risk of incapacitation. Instead, under the *Weeks* prong, the jury was allowed to make its own assessment of whether persons over age 60 can perform the job safely and efficiently. The jury could very well have determined that medical science cannot distinguish between those persons over 60 that will have an incapacitating occurrence and those that will not, but then have determined that persons over age 60 could still perform the job safely and efficiently because the jury disagreed with Western's determination that such increased risk of incapacitation precludes safe job performance.

able in light of the safety risk, the jury should not be allowed to substitute its judgment for that of the airline. *See, e.g., Johnson v. American Airlines, Inc.*, No. 83-1610, slip op. at 675 (5th Cir. Nov. 8, 1984).

Moreover, the deference accorded to the employer in an age discrimination BFOQ case is and should be greater than that accorded to the employer in sex and national origin cases. As noted by Judge Higginbotham, there are

> at least three virtually sub rosa forces that make the requirements for proof of a bona fide occupational qualification under ADEA, while analogous in approach, not as exacting as those of Title VII. The first is inherent in the fact that race, sex and national origin describe an immutable status while age is a dynamic progression. Second and relatedly is the reality that we accept the factual and legal validity of using age as a prediction of certain physical and agility skills, the inquiry being largely the correspondence between the specific age and the specific skill requirement, and we accept that age does so in such a sufficiently efficient manner that its use is not necessarily suspect. Finally, the risk of error when public safety is proved to be actually implicated is resolved in favor of safety.

EEOC v. University of Texas Health Science Center, 710 F.2d 1091, 1097 (5th Cir. 1983) (Higginbotham, J., specially concurring). *See also*, Age Discrimination In Employment Act, Hearings on S. 830 and S. 788 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. 39 (1967), where Secretary of Labor Wirtz stated that the BFOQ exception is "obviously broad."

III. The BFOQ Standard Must Allow Each Airline To Impose A General Rule Where The Airline Has A Factual Basis For Its Determination That It Is Not Practical To Deal With Employees On An Individual Basis

The jury instruction was likewise erroneous on the *Weeks* prong of the BFOQ standard. According to the

Tamiami methodology, once the employer has shown that its stringent job qualification is reasonable in light of the safety risk under *Diaz*, it must then demonstrate a "reasonable cause to believe, that is, a factual basis for believing," either that most persons over a certain age would not meet the stringent job qualification or that it is impossible or impractical to determine who would and who would not meet the stringent qualification on an individual basis, thus justifying a "reasonable general rule." *Weeks*, 408 F.2d at 235; *EEOC v. University of Texas Health Science Center*, 710 F.2d 1091, 1093 (5th Cir. 1983); *Johnson v. American Airlines, Inc.*, No. 83-1610, slip op. at 674 (5th Cir. Nov. 8, 1984).

The trial court below failed to instruct the jury on "the reasonable cause to believe, factual basis for believing," standard of the *Weeks/University of Texas Health Science Center* prong.[8] The Ninth Circuit curiously sidestepped the issue. It recognized that "a standard similar to 'rational basis in fact' is applied . . . in the *second* prong of the BFOQ defense." *Criswell v. Western Air Lines, Inc.*, 709 F.2d 544, 550 n.4 (9th Cir. 1983), *cert. granted*, 53 U.S.L.W. 3235 (U.S. Oct. 2, 1984). It further explained that

> [i]n addition to showing that its general rule is reasonably necessary, an employer must also establish that there is a 'factual basis for believing' that almost all older persons cannot perform adequately or that it is not practical to distinguish between those who can and those who cannot. *EEOC v. County of Santa Barbara*, 666 F.2d 373, 376 (9th Cir. 1982).

709 F.2d at 550 n.4.

The Ninth Circuit had previously applied the "factual basis for believing" standard to the *Weeks* prong in

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[8] The trial court also erred by not instructing the jury on the "all or substantially all" alternative of the *Weeks* test and by not instructing the jury that a "reasonable general rule" may be permitted under the "those who can and those who cannot" alternative of the *Weeks* prong.

EEOC v. County of Santa Barbara, 666 F.2d 373 (9th Cir. 1983):

> the employer must establish that [under the second prong] . . . there is *a factual basis for believing* that all or substantially all persons over a certain age would be unable to perform the duties of the job safely and efficiently, or that it is impossible or impractical to ascertain the difference between older employees who can and cannot perform the job safely.

666 F.2d at 376 (emphasis added).[9] The factual basis for believing standard of *Tamiami/Weeks* has also been adopted by the Sixth Circuit in *Tuohy v. Ford Motor Co.*, 675 F.2d 842, 846 (6th Cir. 1982):

> [On remand,] Ford must present *a factual basis for its determination* that medical science cannot predict, on an individual basis, the likelihood that a pilot who has reached age 60 will become incapacitated during flight.

Accord, Hoefelman v. Conservation Commission of the Missouri Department of Conservation, 718 F.2d 281, 286 (8th Cir. 1983) (emphasis added) (McMillan, J., concurring).

Notwithstanding its endorsement of the "factual basis for believing" standard, the Ninth Circuit, without explanation, upheld the jury instruction even though the instruction required Western to prove the *Weeks* prong[10] by a much more difficult standard. This charge, if allowed to stand, would require employers in safety cases to prove the medical science issue under *Weeks* to a certainty. Although medical experts might differ on whether

[9] The Ninth Circuit also noted in *County of Santa Barbara* that "employers whose business are safety-related have less difficulty proving that age is a BFOQ." 666 F.2d at 377.

[10] The trial court also erred by failing to give a complete version of the *Weeks* prong. *See* note 8, *supra*.

persons over 60 may practically be dealt with on an individual basis, the employer could only prevail by hiring the most persuasive medical expert witnesses and convincing a jury that its experts' view of the issue is the correct view and that the view of the employees' experts is incorrect. Clearly, however, where medical opinion is divided over whether persons over a certain age can be dealt with on an individual basis, the employer should be allowed to resolve that controversy in a conservative manner, erring, if at all, on the side of safety. This is especially true in the case of airlines, where risk management is the essence of their business.

The standard of proof applied by the Ninth Circuit does not comport with the standard of proof applied by this Court in a Title VII BFOQ case, *Dothard v. Rawlinson*, 433 U.S. 321 (1977).[11] While stating that "it is impermissible under Title VII to refuse to hire . . . on the basis of stereotyped characterizations of the sexes," the Court upheld the employer's exclusion of women from serving as prison guards because "[t]here is *a basis in fact for expecting* that sex offenders who have criminally assaulted women in the past would be moved to do so again if access to women were established within the prison." 433 U.S. at 335. (emphasis added). American relied upon the *Dothard* standard in *Johnson v. American Airlines, Inc.*, No. CA-3-80-434-D

[11] The Court in *Dothard* characterized the BFOQ exception under Title VII as "extremely narrow." 433 U.S. at 335. The legislative history of the ADEA, the recognized correlation between age and ability, and the lack of prejudice against older workers indicate that the BFOQ exception under the ADEA is broader than the BFOQ exception under Title VII. *See, e.g.*, U.S. Department of Labor Report to the Congress on Age Discrimination in Employment under § 715 of the Civil Rights Act of 1965, at 6-8; 113 Cong. Rec. 34,742 (1967) (statement of Rep. Burke); Age Discrimination in Employment Act, Hearings on H.R. 3651, H.R. 3768, and H.R. 4221 before the General Subcommittee on Labor of the House Committee on Education and Labor, 90th Cong., 1st Sess. 8 (1967) (testimony of Secretary of Labor Wirtz).

(N.D. Tex. 1983), *aff'd* No. 83-1610, slip op. (5th Cir. Nov. 8, 1984), in which American demonstrated that it had a factual basis for expecting that to allow age 60 pilots to serve as flight officers would diminish the effectiveness of American's training of future captains and would undermine American's crew command structure, both to the detriment of flight safety.

IV. The BFOQ Standard Must Recognize Each Airline's Obligation To Maximize Safety

Finally, the trial court's jury instruction gave the jury not one hint of the federal mandate imposed upon all certificated air carriers to operate with "the highest possible degree of safety in the public interest." 49 U.S.C. § 1421(b). If allowed to stand, airlines would be forced to choose between maximizing safety and incurring liability for employment discrimination. This would not only be bad policy, it would also represent an unwarranted judicial negation of the will of Congress as expressed in the Federal Aviation Act in favor of the will of Congress as expressed in the ADEA. The better policy, and the only way to harmonize both acts of Congress, is to apply the ADEA to airlines in the context of their statutory duty to maximize safety.

The District of Columbia Circuit did just that in *Murnane v. American Airlines, Inc.*, 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982). In applying the *Tamiami* standard, the court reasoned as follows:

> we find the maximization of safety to be 'reasonably necessary to the normal operation' of American Airlines. The safe transportation of its passengers is the essence of American's business [citing *Diaz*], and there exists a Congressional mandate that an airline must operate its business with 'the highest possible degree' of care. . . . This is in accord with American's view that 'safe' is not sufficient. Rather, the 'safest' possible air transportation is the ultimate goal. Courts, in our view, do not possess the expertise with which, in a cause presenting safety as the critical element, to supplant their judgments for those of the employer.

667 F.2d at 101. *Accord, Johnson v. American Airlines, Inc.*, No. 83-1610, slip op. at 673 (5th Cir. Nov. 8, 1984). *See also, e.g., Condit v. United Air Lines, Inc.*, 558 F.2d 1176 (4th Cir. 1977) (per curiam), *cert. denied*, 435 U.S. 934 (1978) ("United's policy of refusing to allow stewardesses to fly from the time they learned they were pregnant was consistent with a common carrier's duty to exercise the highest degree of care for the safety of its passengers").

In approving the failure to charge the jury regarding Western's duty to maximize safety, the Ninth Circuit stated that the instruction's reference to "safe transportation" and "safe" job performance "struck a proper balance" between the FAA mandate and the ADEA. *Criswell*, 709 F.2d at 551. American strongly disagrees. The federal mandate is not to operate safely, but to operate as safely as possible. The jury should have been instructed to consider that federal mandate in deciding whether Western's policy was reasonably necessary to the essence of its business.

CONCLUSION

The judgment of the court of appeals should be reversed.

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AMICUS CURIAE

BRIEF

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No. 83-1545

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

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and RULON H. STARLEY,
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WESTCOT B. STONE, III, *et al.*,
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On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF DELTA AIR LINES, INC. AS AMICUS CURIAE IN SUPPORT OF REVERSAL

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. THE BURDEN OF PROOF WAS IMPROPERLY SHIFTED TO WESTERN TO ESTABLISH THE REASONABLE FACTORS OTHER THAN AGE DEFENSE BY A PREPONDERANCE OF THE EVIDENCE	6
II. WESTERN WAS DEPRIVED OF A FAIR OPPORTUNITY TO ESTABLISH A BONA FIDE OCCUPATIONAL QUALIFICATION FOR ITS FLIGHT DECK CREWMEMBER POSITIONS	11
CONCLUSION	15

TABLE OF AUTHORITIES

Cases	Page
Criswell v. Western Airlines, Inc., 709 F.2d 544 (9th Cir. 1983)	passim
Harriss v. Pan American World Airways, Inc., 649 F.2d 670 (9th Cir. 1980)	14-15
Johnson v. American Airlines, Inc., No. 83-1610 (5th Cir. Nov. 8, 1984)	11, 14-15
Levin v. Delta Air Lines, Inc., 730 F.2d 994 (5th Cir. 1984)	14
Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979)	8, 10
Lorillard v. Pons, 434 U.S. 575 (1978)	9
Marshall v. Westinghouse Electric Corp., 576 F.2d 588 (5th Cir. 1978)	6, 8, 10
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	8-9
Murnane v. American Airlines, Inc., 667 F.2d 98 (D.C. Cir. 1981)	13-14
Sutton v. Atlantic Richfield Co., 646 F.2d 407 (9th Cir. 1981)	8-9
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981)	8-10
Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976)	11-13, 15
Statutes	
29 U.S.C. § 623(f)	passim
42 U.S.C. § 2000e *et. seq.*	9
49 U.S.C. § 1421(b)	passim
Miscellaneous	
2A *Moore's Federal Practice* ¶¶ 8.26, 8.27	7

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On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF DELTA AIR LINES, INC. AS AMICUS CURIAE

Delta Air Lines, Inc., with the consent of all parties, respectfully submits this brief as Amicus Curiae.

INTEREST OF THE AMICUS CURIAE

Delta Air Lines, Inc. ("Delta") is a major trunk air carrier providing scheduled air transportation for passengers, freight, and mail. Delta serves 95 cities in the United States and also operates flights to Canada, the

Caribbean, and Europe. During fiscal 1984, Delta enplaned 36.3 million revenue passengers and operated an average of 1500 flights per day.

This case involves a question of critical importance to Delta—the qualifications of second officers (flight engineers) who serve in the cockpit of commercial aircraft certificated by the Federal Aviation Administration ("FAA") to be operated by three crewmembers. The second officer is an essential member of the cockpit crew which, for reasons that are both obvious and compelling, must function efficiently and effectively at all times.

The Federal Aviation Act requires airlines "to perform their services with the highest possible degree of safety in the public interest." 49 U.S.C. § 1421(b). Consistent with this duty, Delta (1) employs only pilots for its flight deck crews; (2) hires pilots as second officers and expects them to advance to the positions of first officer and captain during their careers; (3) prohibits two-step biddowns from captain to second officer regardless of the age of the captain; and (4) requires all members of the cockpit crew to retire at age 60. These policies promote safety by establishing a command structure and career progression which ensures that the captain in command of the aircraft is the most experienced pilot in the cockpit, and by providing an optimal blend of experience on the flight deck.

To ensure the proper functioning of the flight crew, it is imperative that clear lines of authority exist among crew members; only one pilot may command an aircraft and that person is the captain. Under Delta's policies, the captain will always be more experienced than the first and second officers with whom he works, and Delta believes that any departure from this cockpit command structure will adversely affect safety. Accordingly, Delta is adamantly opposed to two-step biddowns because the role reversal inherent in placing a senior captain in the subordinate role of a second officer has a chilling effect on

command authority and creates the potential for conflicts as to who is actually in command of the aircraft. Specifically, Delta is concerned that a senior captain serving as a second officer might attempt to improperly assert himself over the junior captain in the command decision-making process, particularly in an emergency situation. Similarly, this role reversal may adversely affect the junior captain who is likely to beileve that his decisions will be second-guessed by the senior pilot who is serving as his second officer.

Delta also believes that second officers, like captains and first officers, should be required to retire at age 60. Like those pilots, second officers perform essential functions in the cockpit and have an important impact on flight safety. The medical concerns leading to the FAA's Age 60 rule are as applicable to the second officer as to other cockpit crew members.

The lower courts in this case erred (1) by shifting to Western the burden of proving by a preponderance of the evidence its reasonable factors other than age defense, and (2) by failing to recognize in connection with Western's bona fide occupational qualification defense that air carriers are entitled to substantial discretion when establishing safety related operational and personnel policies. These errors present a clear and present danger to aviation safety, and are fundamentally inconsistent with the Age Discrimination in Employment Act ("ADEA") and the Federal Aviation Act. Accordingly, Delta has a strong and compelling interest in this case.[1]

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[1] Delta's policy prohibiting two-step biddowns from captain to second officer was recently challenged under the ADEA by a senior captain seeking to biddown to the second officer position upon his retirement at age 60. *Iervolino v. Delta Air Lines, Inc.*, No. C81-2327A (N.D. Ga. 1984). Following a three week trial, the jury returned a general verdict in Delta's favor. The District Court entered judgment on the jury's verdict and subsequently denied Plaintiff's motion for judgment notwithstanding the verdict, or in the alternative, for a new trial. On October 26, 1984, Plaintiff filed a notice of appeal to the Eleventh Circuit.

SUMMARY OF ARGUMENT

This case is extremely important to the airline industry and the travelling public because of its implications concerning the safety of airline operations. It is also of great importance in clarifying the burdens of proof under the ADEA and in reconciling the tension between the Federal Aviation Act, which requires air carriers "to perform their services with the highest possible degree of safety in the public interest", and the ADEA, which precludes discrimination on the basis of age.

The Court has indicated that it will review two questions under the ADEA: (1) the proper burden of proof in connection with a defense of "reasonable factors other than age" ("RFOA"); and (2) the appropriate test for establishing a bona fide occupational qualification ("BFOQ").

With respect to the first question, the Ninth Circuit held that Western had the burden of proof in connection with its RFOA defense *solely* on the basis that that defense, like the BFOQ defense, is expressly set forth in the ADEA. The Ninth Circuit's conclusion is clearly erronoeus, however, because it failed to recognize the nature of the RFOA defense.

In determining if a defense is an affirmative one, it is necessary to consider the nature of the defense, not whether it is specifically included in a statute. An affirmative defense is one that *admits* for the purpose of argument the allegations of the complaint but nevertheless shows that the plaintiff is not entitled to prevail. Such a defense is in the nature of "confession and avoidance." Thus, in cases of true affirmative defenses, the burden of proof with respect to the defense properly lies with the defendant who raises it, just as the plaintiff has the burden of proof concerning matters raised in the complaint.

An RFOA defense to a claim of discrimination under the ADEA does *not* admit that discrimination has occurred, and is not in the ratue of confession and avoidance. Instead, it *denies* that age discrimination has occurred and is based on the contention that the action complained of occurred because of reasonable factors *other than age*. As such it is *not* an affirmative defense and it does not change the plaintiff's ultimate burden of proof.

The Ninth Circuit incorrectly failed to recognize the nature of the RFOA defense, and its error seriously prejudiced Western. If the issue is not properly clarified by this Court, other litigants may be similarly prejudiced.

It is in connection with the BFOQ issue that the tension arises between the Federal Aviation Act's requirement of the "highest possible degree of safety" and the ADEA's prohibition against age discrimination. While the Ninth Circuit's resolution of this tension paid lip service to the airlines' safety requirements, the effect of its decision is to almost totally disregard the statutory obligation of air carriers with respect to safety.

The errors of the Ninth Circuit and the district court relate to the district court's instructions to the jury. The district court's BFOQ charge failed to inform the jury of Western's duty under the Federal Aviation Act to operate with the "highest possible degree of safety", and implied that the jury should determine if age is an appropriate BFOQ for second officers *without any consideration of the air carrier's responsibilities and expertise*. It is obvious that an air carrier cannot meet its obligations under the Federal Aviation Act unless it is allowed a reasonable degree of discretion in establishing its standards for safe operations. Several Courts of Appeal have concluded that such discretion is necessary

with respect to BFOQ's in cases involving safety, and Delta submits that the rule in those cases must be followed if the statutory schemes of the Federal Aviation Act and the ADEA are to be harmonized.

ARGUMENT

I. THE BURDEN OF PROOF WAS IMPROPERLY SHIFTED TO WESTERN TO ESTABLISH THE REASONABLE FACTORS OTHER THAN AGE DEFENSE BY A PREPONDERANCE OF THE EVIDENCE

The first question on which this Court granted certiorari addresses the proper allocation of the burden of proof as to the RFOA defense contained in Section 4 (f) (1) of the ADEA, 29 U.S.C. § 623(f) (1).[2]

The district court instructed the jury that Western had the burden of proving "by a preponderance of the evidence" that its decision refusing to allow Criswell and Starley to downbid to the position of second officer was motivated by "reasonable factors other than age." *Criswell v. Western Airlines, Inc.*, 709 F.2d 544, 552 (9th Cir. 1983). The Ninth Circuit upheld this jury instruction on the basis that the RFOA defense is an affirmative defense as to which the defendant has the burden of proof. 709 F.2d at 553.

The Ninth Circuit recognized that its ruling was not consistent with *Marshall v. Westinghouse Electric Corp.*, 576 F.2d 588 (5th Cir. 1978) in which the Fifth Circuit

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[2] 29 U.S.C. § 623(f)(1) states in part:

"(f) it shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section . . . where the differentiation is based on reasonable factors other than age;"

treated the RFOA defense "as an analog to the legitimate, non-discriminatory reason rebuttal developed in *McDonnell Douglas*", but rejected that approach because it did not "believe that a statutory exception may be properly analogized to the second stage of the case-in-chief under a disparate treatment theory." 709 F.2d at 553.

Delta submits that the resolution of this important burden of proof issue should not and does not depend on a mechanical determination of whether the defense is expressly set forth in the statute—as the Ninth Circuit concluded. Rather it should be resolved in light of the nature of the defense. That Congress thought it important to specifically include a statement that actions taken for reasons other than age would not violate the law does not, *ipso facto*, mean that a defense asserting such factors is an affirmative defense as to which the defendant has the burden of proof. Indeed, whether a defense is expressly included in a statute has nothing to do with determining whether it is an affirmative defense. The essential nature of an affirmative defense is that it admits for the purpose of argument that the allegations of the complaint are true, but nevertheless sets forth a defense to the allegations.[3] This being so, a RFOA defense could never be an affirmative defense because it *denies* that age discrimination has occurred and contends that the action in question was taken because of reasonable factors *other than age*.

The validity of this point is demonstrated by viewing the RFOA defense in relation to the BFOQ defense. There is no disagreement among the courts that the

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[3] See 2A *Moore's Federal Practice* ¶ 8.27[3] where it is stated that "Any matter that does not tend to controvert the opposing party's prima facie case as determined by applicable substantive law should be pleaded" as an affirmative defense. But where a pleading is in the nature of a denial and erroneously is labeled as an affirmative defense, this does not shift the burden of proof, which remains on the plaintiff. *Id.*, ¶ 8.26.

BFOQ defense is an affirmative defense as to which the defendant has the burden of proof. This is entirely consistent with the theory of affirmative defenses because a BFOQ defense assumes *arguendo* that age discrimination has occurred, but says it is permissible because age is a bona fide occupational qualification allowed under the ADEA.

Thus, the Ninth Circuit's conclusion that the RFOA defense is an affirmative defense because it "appears alongside the BFOQ exception in the ADEA" (709 F.2d at 552) is not well-founded. The Court gave no other reasons for concluding that the RFOA defense was an affirmative defense.

Moreover, the basic scheme of the ADEA does not indicate that a RFOA defense should be treated as an affirmative defense. The purpose of the law is to prevent age discrimination in the workplace and the burden of proving such discrimination necessarily falls upon the party alleging that it has occurred. Thus, the plaintiff has this ultimate burden at all times. In a RFOA defense, the employer contends that the action at issue took place because of reasonable factors other than age. It would be anomalous if the defendant was forced to assume the burden of proof merely because it asserted such a defense. As Western contended in the lower courts, the RFOA defense is comparable to a "legitimate, nondiscriminatory reason" defense in a Title VII case and the analysis of the order and burden of proof set forth in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 802 (1973), should apply.

It is elementary that the burden of establishing a claim of discrimination is on the plaintiff. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Sutton v. Atlantic Richfield Co.*, 646 F.2d 407 (9th Cir. 1981); *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979); *Marshall v. Westinghouse Electric Corp.*, 576 F.2d 588 (5th Cir. 1978). This is true of cases brought

under Title VII as well as the ADEA. "The evidentiary guidelines allocating the burdens and presentation of proof in discrimination cases as set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and its progeny, though specifically addressed to Title VII cases, 42 U.S.C. § 2000e *et. seq.*, are generally applicable to age discrimination cases." *Sutton v. Atlantic Richfield Co.*, 646 F.2d 407, 411 (9th Cir. 1981). As these statutes share similar aims and substantive prohibitions—the elimination of arbitrary discrimination in the workplace—it is only logical that they both follow the same evidentiary guidelines. As noted by this Court, "the prohibitions of the ADEA were derived *in haec verba* from Title VII." *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). The Ninth Circuit as well as the other circuits have adopted the allocations of the burdens and ordering of proof as set forth in *McDonnell Douglas* in suits brought under the ADEA. *Sutton v. Atlantic Richfield Co., supra.* As stated by the Ninth Circuit in that case: "We follow the other circuits in adopting the *McDonnell Douglas* allocation of the burdens and ordering of proof in suits brought under the ADEA." 646 F.2d at 412. The panel of the Ninth Circuit which decided this case cited the *Sutton* case as supporting its conclusion that the RFOA defense is an affirmative defense, but it did not discuss the apparent inconsistency.

The proper allocation of the burden of proof in discrimination cases is fully discussed in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Regarding the defendant's burden once the plaintiff establishes a prima facie case, this Court said:

> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defend-

ant's evidence raises a genuine issue of facts as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions.

Texas Department of Community Affairs v. Burdine, 450 U.S. 254-56 (citations and footnotes omitted).

The plaintiff must ultimately prove that age was a determining factor in the action by the defendant being challenged. Once the plaintiff has established the elements of the prima facie case, the defendant may then articulate or produce a nondiscriminatory reason for its actions. The defendant in an ADEA case does not bear the burden of proving by a preponderance of the evidence a defense based on reasonable factors other than age. Rather, the defendant merely needs to articulate its RFOA defense as a legitimate, nondiscriminatory reason for its action. Unlike the BFOQ defense, which is an affirmative defense of confession and avoidance, the RFOA defense is a denial of plaintiff's prima facie case. The burden of proof properly belongs on the party challenging the action in issue. *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979); *Marshall v. Westinghouse Electric Corp.*, 576 F.2d 588 (5th Cir. 1978).

The Ninth Circuit's holding on the burden of proof on the RFOA defense is inconsistent with its own prior rulings and those of other circuits and this Court. It is clearly erroneous and should be reversed.

II. WESTERN WAS DEPRIVED OF A FAIR OPPORTUNITY TO ESTABLISH A BONA FIDE OCCUPATIONAL QUALIFICATION FOR ITS FLIGHT DECK CREWMEMBER POSITIONS

The second question on which this Court granted certiorari addresses the proper test for establishing a BFOQ.[4] As with the RFOA issue, the BFOQ question arises in the context of the district court's jury instructions. The district court's charge on the BFOQ issue was materially defective because it failed to recognize that an air carrier is entitled to substantial discretion when it establishes operational and personnel policies consistent with the Congressional mandate of operating with "the highest possible degree of safety in the public interest." *See Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 n.30 (5th Cir. 1976). "Courts simply do not possess the expertise with which to supplant their judgment in the best manner airlines can obtain that highest degree of safety for that of the airlines' judgment." *Johnson v. American Airlines, Inc.*, No. 83-1610 (5th Cir. Nov. 8, 1984).

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[4] The BFOQ defense is found in Section 4(f)(1) of the ADEA, 29 U.S.C. § 623(f)(1) which states in relevant part:

> (f) it shall not be unlawful for an employer, employment agency or labor organization—
>
> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business. . ."

Although it generally prohibits discrimination based on age, the ADEA contains several exceptions which allow the use of age as an employment criteria in certain limited situations. The BFOQ exception is an affirmative defense that allows an employer to discriminate on the basis of age against members of the protected class if "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1). Once established, a BFOQ permits an employment policy which would otherwise be considered discriminatory.

The leading case on the BFOQ defense is *Usery v. Tamiami Trail Tours, Inc., supra*, in which the Fifth Circuit established a two-prong test for reviewing occupational qualifications. To qualify as a BFOQ: (1) the qualifications must be reasonably necessary to the essence of the defendant's business and (2) the employer must have reasonable cause, that is, a factual basis, for believing *either* that all or substantially all members of a class would be unable to perform safely and efficiently the duties of the job involved, *or* that some of the class would be unable to do so and that it was impossible or impractical to deal with persons over the age limit on an individualized basis.

In balancing the rights of an individual claiming discrimination against the need to protect the safety of the travelling public, the Fifth Circuit in *Tamiami* held that its BFOQ test must be adjusted to accommodate an employer's obligation to insure the safety of the public. "The greater the safety factor, measured by the likelihood of harm and the probable severity of that harm in case of an accident, the more stringent may be the job qualifications designed to insure [safety]." *Tamiami*, 531 F.2d at 236. Further, "[W]e believe that courts must afford employers substantial—though not absolute—discretion in selecting specific safety standards and in judging their reasonableness." *Tamiami*, 531 F.2d at 236 n.30.

It is clear that the Fifth Circuit in establishing its two-prong BFOQ test intended that courts and juries would not be permitted to substitute their judgment for the discretion properly due to an employer because of its experience and expertise. Employers were not to be required to lower their safety standards because they could not prove to an absolute certainty the risks they were trying to avoid without inviting a tragic accident. Specifically, the Fifth Circuit cautioned:

> We emphasize safety in busing just as we would in a variety of other industrial areas where safety to fellow employees is of such humane importance that the employer must be afforded substantial discretion in selecting specific standards which, if they err at all, should err on the side of preservation of life and limb. The employer must of course show a reasonable basis for its assessment of risk of injury/death. But it cannot be expected to establish this to a certainty, for certainty would require running the risk until a tragic accident would prove that the judgment was sound. Priceless as is a single life in our concept of the value of human life and our undoubted unwillingness ever to approve a practice which might kill one but not, say, twenty, we think the safety factor should be evaluated in terms of the possibility or likelihood of injury/death.

Tamiami, 531 F.2d at 238.

The nation's air carriers are charged by law with providing the highest possible degree of safety. Air carriers as an industry daily transport millions of passengers at speeds and altitudes that leave virtually no margin for human error. The potential consequences of an air carrier's failure to operate to the highest degree of safety are obvious. "The airline industry is one in which safety is of the utmost importance. The staggering death tolls and resulting human suffering which have followed some of our nation's horrible air disasters attest to this fact."

Murnane v. American Airlines, Inc., 667 F.2d 98, 101 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982). The policy concerns of public safety have generally been given a wide degree of deference in the aviation industry in discrimination cases. "[T]he airline industry must be accorded great leeway and discretion in determining the manner in which it may be operated *most safely*." *Murnane v. American Airlines, Inc.*, 667 F.2d at 101. *See also Levin v. Delta Air Lines, Inc.*, 730 F.2d 994 (5th Cir. 1984). (Legitimate concern for safety justifies flight attendant pregnancy policy where policy's contribution to safety is more than minimal.); *Harriss v. Pan American World Airways, Inc.*, 649 F.2d 610 (9th Cir. 1980) (Adopts *Tamiami* in approving BFOQ in flight attendant maternity case); *Johnson v. American Airlines, Inc., supra.* (Determination as to whether airline policy requiring flight officers to retire or transfer to noncockpit positions at age 60 is a BFOQ must also be guided by Congressional mandate which "imposes on airlines the duty to perform their services with the highest degree of safety.")

The ADEA includes the BFOQ provision as an accommodation where "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." While the BFOQ provision may not have been intended to specifically accommodate the safety requirements of the Federal Aviation Act, it clearly was intended to allow for a harmonizing of the ADEA's requirements with bona fide and valid conflicting requirements such as those which many airlines have adopted in order to meet their responsibilities under the Federal Aviation Act. The question here is whether the Ninth Circuit correctly utilized the BFOQ provision to effect the purposes of both acts.

The BFOQ instuction in *Western* failed to accommodate the safety requirements of the Federal Aviation Act. It was erroneous because it failed to inform the

jury (1) that airlines have a statutory duty "to perform their services with the highest possible degree of safety in the public interest" and (2) that airline managements are entitled to substantial discretion in establishing safety related job qualifications. Western was clearly entitled to such an instruction under *Harriss* and *Tamiami*. The failure of the lower courts to use the proper BFOQ test was serious and harmful error which requires reversal.

CONCLUSION

The Ninth Circuit improperly decided the issues related to: (1) the proper burden of proof in connection with the RFOA defense in this case and (2) the appropriate test for establishing a BFOQ. Accordingly, the Ninth Circuit's decision should be reversed for the reasons stated above.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WESTERN AIR LINES, INC.,

Petitioner,

—v.—

CHARLES G. CRISWELL, ALBERT RON and RULON H. STARLEY,

Respondents.

WESTERN AIR LINES, INC.,

Petitioner,

—v.—

WESTCOT B. STONE, III, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF TRANS WORLD AIRLINES, INC. IN SUPPORT OF REVERSAL

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
STATEMENT OF INTEREST	1
INTRODUCTION	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
CONCLUSION	6

TABLE OF AUTHORITIES

Cases	Page
Garner v. Boorstin, 690 F.2d 1034 (D.C. Cir. 1982)	4
Gibson v. Mohawk Rubber Co., 695 F.2d 1093 (8th Cir. 1982)	4
Marshall v. Westinghouse Electric Corp., 576 F.2d 588 (5th Cir. 1978)	5
Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981)	4,5
United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983)	4

Statutes

Age Discrimination in Employment Act:

Section 4(f)(1), 29 U.S.C. § 623(f)(1) 3

BRIEF AMICUS CURIAE OF
TRANS WORLD AIRLINES, INC.

STATEMENT OF INTEREST

Trans World Airlines, Inc. ("TWA")[1] is a major U.S. airline with a pilot work force of approximately 3,000 people. This case is of particular interest to TWA because of two consolidated cases that were argued to this Court on October 9, 1984 and remain pending. Trans World Airlines, Inc. v. Harold H. Thurston, et al., No. 83-997, and Air Line Pilots Association, International v. Harold H. Thurston, et al., No. 83-1325 (hereinafter referred to as "Thurston").

INTRODUCTION

In addition to the Statement of the Case filed by petitioner Western, TWA includes

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[1] TWA has no parent, subsidiary or affiliate required to be reported under Rule 28.1 of this Court. Effective February 1, 1984, TWA was divested from Trans World Corporation.

the following facts from the pending Thurston action: In 1978, TWA became the only trunk airline to voluntarily permit former Captains to serve as Flight Engineers (TWA Br., p. 7).[2] Captains seeking to become Flight Engineers (and thereby avail themselves of the opportunity to work beyond age 60) could change their status to Flight Engineer in accordance with the existing bidding procedures of the Working Agreement (TWA Br., p. 9). Under TWA's policy, 83% of those Captains seeking to serve beyond age 60 have succeeded in that regard pursuant to the terms of a neutral, bona fide seniority system (TWA Br., p. 21).

SUMMARY OF ARGUMENT

In its decision below, the Ninth Circuit erroneously assigned to the employer the burden of proving that its actions constitute

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[2] References to "TWA Br." are to the brief on the merits filed by TWA in Nos. 83-997 and 83-1325 pending before this Court.

"reasonable factors other than age." As this Court has repeatedly emphasized, a plaintiff and not the defendant bears the ultimate burden of proving discrimination vel non.

ARGUMENT

REASONABLE FACTORS OTHER THAN AGE IS NOT AN AFFIRMATIVE DEFENSE

In Thurston, TWA has argued that its "age 60" policy can be viewed as "based on reasonable factors other than age" under Section 4(f)(1) of the ADEA, 29 U.S.C. § 623(f)(1) (TWA Br., p. 26 n.32, and cases cited therein). Here, the Ninth Circuit has taken the position that "reasonable factors" is an affirmative defense with the burden of persuasion on an employer. It has thereby misinterpreted the statutory language and ignored the well-established principles of burden of proof in disparate treatment cases.

In any disparate treatment case, a plaintiff always bears the burden of proving "the ultimate question of discrimination vel non." United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 714 (1983). If a plaintiff succeeds in establishing a prima facie case, then the burden shifts to the defendant but that burden is only "'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.'" Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). Plaintiff always maintains the ultimate burden of persuasion, i.e., "to prove . . . that the legitimate reasons . . . were a pretext for discrimination." (Id.)[3]

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[3]Although Burdine is a Title VII case, the standard established by this Court for imposing liability under Title VII has been utilized in many ADEA cases. See, e.g., Garner v. Boorstin, 690 F.2d 1034, 1036 n.3 (D.C. Cir. 1982); Gibson v. Mohawk Rubber Co., 695 F.2d 1093, 1100 n.7 (8th Cir. 1982).

Nothing in the language of Section 4(f)(1) suggests that "reasonable factors" is an affirmative defense and that the established burden of proof principles disappear. Instead, "reasonable factors" should be given its ordinary reading and viewed as simply another phrasing of the employer's burden of articulating a "legitimate, nondiscriminatory reason." Burdine, supra, 450 U.S. at 253. Accord, e.g., Marshall v. Westinghouse Electric Corp., 576 F.2d 588, 591-92 (5th Cir. 1978).

The folly of the Ninth Circuit's holding is clear. If allowed to stand, defendants in ADEA cases will simply style their defenses as "legitimate, nondiscriminatory reasons" rather than "reasonable factors," thereby avoiding a shift in the burden of persuasion. Yet any difference between the two standards is purely semantic.

CONCLUSION

For the above-stated reasons and the reasons advanced by Western, the decision of the Ninth Circuit should be reversed.

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November 14, 1984

PETITIONER'S

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QUESTIONS PRESENTED

1. Whether, in an age discrimination case against an airline, the BFOQ charge to the jury is erroneous where it (a) fails to accord the airline any discretion in selecting qualifications for cockpit crew members; (b) does not allow the airline to apply a reasonable general rule excluding persons over a certain age when it has a factual basis for concluding that it is impossible or impractical to deal with such persons on an individual basis; and (c) fails to recognize the airline's legal duty to conduct its operations with the highest possible degree of safety.

2. Whether, in an age discrimination case in which the employer denies that the employee's age was a determining factor in the challenged employment decision, the employer has the burden of persuasion to show that the employment decision was based on reasonable factors other than age.

PARTIES

Western Air Lines, Inc.* was defendant in both of the proceedings below. The plaintiffs in *Criswell, et al. v. Western Air Lines, Inc.* are Charles G. Criswell, Ruion H. Starley and Albert Ron. *Stone v. Western Air Lines, Inc.* is a class action which presently has twelve plaintiff class members: Westcot B. Stone, III, Robert L. Butler, Norval P. Cavett, Jack R. Dean, Brentall J. Higgs, Allen J. McLaren, Bill H. Pelton, Albert J. White, Henry J. Wiegand, Eugene R. Black, Neil S. Foster and Jack L. Keyes. The Airline Pilots Association International is not a party to the *Criswell* action, but is a third-party defendant in the *Stone* action.

* Pursuant to Sup. Ct. Rule 28.1, the following is the only parent, affiliate or subsidiary of Western Air Lines, Inc.: WAL Communications, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	11
ARGUMENT	14
I. The Trial Court Erred In Charging The Jury On The BFOQ Standard	14
A. The Appropriate BFOQ Standard In Safety Cases	18
B. The Jury Instruction Failed To Accord Western Any Discretion In Selecting Job Qualifications For Essential Flight Personnel That Are Reasonable In Light Of The Safety Risks	30
C. The Jury Instruction Omitted The "Factual Basis For Believing" Standard For Determining Whether It Is Practical For Western To Distinguish Between Those Who Do And Do Not Possess The Requisite Job Qualifications	37

TABLE OF CONTENTS—Continued

	Page
D. The Jury Instruction Failed To Recognize Western's Duty To Conduct Its Operations With The Highest Possible Degree Of Safety	42
II. The Trial Court Erred By Instructing The Jury That Western Was Required To Prove By A Preponderance Of The Evidence That Its Challenged Employment Decisions Were Based On Reasonable Factors Other Than Age	43
CONCLUSION	49

TABLE OF AUTHORITIES

Cases:	Page
Aaron v. Davis, 414 F. Supp. 453 (E.D. Ark. 1976)	23
Air Line Pilots Association, International v. Quesada, 182 F. Supp. 595 (S.D.N.Y. 1960), *aff'd*, 276 F.2d 892 (2d Cir. 1960), *cert. denied*, 366 U.S. 962 (1961)	27, 42
Air Line Pilots Association, International v. Trans World Airlines, Inc., 713 F.2d 940 (2d Cir. 1983), *cert. granted sub nom. Trans World Airlines, Inc. v. Thurston*, 104 S.Ct. 1412 (1984)	22
Arritt v. Grisell, 567 F.2d 1267 (4th Cir. 1977)	22, 23
Beck v. Manheim, 505 F. Supp. 923 (E.D. Pa. 1981)	23
Board of Trustees v. Sweeny, 439 U.S. 24 (1978)	46
Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973)	32
Burwell v. Eastern Air Lines, Inc., 633 F.2d 361 (4th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981)	41
Condit v. United Air Lines, Inc., 13 Fair Empl. Prac. Cas. (BNA) 689 (E.D. Va. 1976), *aff'd*, 558 F.2d 1176 (4th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978)	41
Condit v. United Air Lines, Inc., 558 F.2d 1176 (4th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978)	23
Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971)	18, 20, 24
Dothard v. Rawlinson, 433 U.S. 321 (1977)	16, 23, 25, 27, 28, 29, 41
Equal Employment Opportunity Commission v. City of St. Paul, 671 F.2d 1162 (8th Cir. 1982)	26
Equal Employment Opportunity Commission v. County of Los Angeles, 706 F.2d 1039 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 984 (1984)	22
Equal Employment Opportunity Commission v. County of Santa Barbara, 666 F.2d 373 (9th Cir. 1982)	23, 44

TABLE OF AUTHORITIES—Continued

	Page
Equal Employment Opportunity Commission v. University of Texas Health Science Center, 710 F.2d 1091 (5th Cir. 1983)	22, 23, 25, 28, 37
Equal Employment Opportunity Commission v. Wyoming, 460 U.S. 226 (1983)	15, 28, 48
Furnco Construction Co. v. Waters, 438 U.S. 567 (1978)	47
Gathercole v. Global Associates, 727 F.2d 1485 (9th Cir. 1984)	40
Griggs v. Duke Power Company, 401 U.S. 427 (1971)	47, 48
Harriss v. Pan American World Airways, Inc., 649 F.2d 670 (9th Cir. 1980)	22, 23
Harriss v. Pan American World Airways, Inc., 437 F. Supp. 413 (N.D. Cal. 1977), *aff'd*, 649 F.2d 670 (9th Cir. 1980)	35, 41
Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), *cert. denied sub nom. Brennan v. Greyhound Lines, Inc.*, 419 U.S. 1122 (1975)	23, 24, 31
Hodgson v. Tamiami Trail Tours, Inc., 4 Empl. Prac. Dec. (CCH) ¶ 7795 (S.D. Fla. 1972), *aff'd*, 531 F.2d 224 (5th Cir. 1976)	22
Hoefelman v. Conservation Commission of Missouri Department of Conservation, 718 F.2d 281 (8th Cir. 1983)	22, 23, 26, 37, 38
Houghton v. McDonnell Douglas Corp., 553 F.2d 561 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977)	22, 26
Johnson v. American Airlines, Inc., No. 83-1610 (5th Cir. 1984)	23, 25, 37
Keating v. Federal Aviation Administration, 610 F.2d 611 (9th Cir. 1979)	6
Levin v. Delta Air Lines, Inc., 730 F.2d 994 (5th Cir. 1984)	9, 23
Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979)	46, 47
Mahoney v. Trabucco, 738 F.2d 35 (1st Cir. 1984)	22, 34
Markham v. Geller, 451 U.S. 945 (1981)	48

TABLE OF AUTHORITIES—Continued

	Page
Marshall v. Baltimore & Ohio Railroad, 461 F. Supp. 362 (D. Md. 1978), *modified*, 632 F.2d 1107 (4th Cir. 1980), *cert. denied*, 454 U.S. 825 (1981)	44
Marshall v. Westinghouse Electric Corp., 576 F.2d 588 (5th Cir. 1978)	46, 47
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	9, 44, 46, 47
Monroe v. United Air Lines, 736 F.2d 394 (7th Cir. 1984)	22
Murnane v. American Airlines, Inc., 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982)	23, 30, 43
Murnane v. American Airlines, Inc., 482 F. Supp. 135 (D. D.C. 1979), *aff'd*, 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982)	27, 42
Orzel v. City of Wauwatosa Fire Department, 697 F.2d 743 (7th Cir.), *cert. denied*, 104 S.Ct. 484 (1983)	22, 23
Smallwood v. United Air Lines, Inc., 661 F.2d 303 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982)	22
Starr v. Federal Aviation Administration, 589 F.2d 307 (7th Cir. 1979)	32
Stewart v. Smith, 673 F.2d 485 (D.C. Cir. 1982)	22
Sutton v. Atlantic Richfield, 646 F.2d 407 (9th Cir. 1981)	44
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981)	44, 46
Tuohy v. Ford Motor Co., 675 F.2d 842 (6th Cir. 1982)	22, 23, 25, 37
Tuohy v. Ford Motor Co., 490 F. Supp. 258 (E.D. Mich. 1980), *rev'd*, 675 F.2d 842 (6th Cir. 1982)	27
Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976)	18, 19, 20, 21, 22, 23, 24, 25, 28, 30, 37, 41
Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228 (5th Cir. 1969)	18, 19, 20, 24

TABLE OF AUTHORITIES—Continued

	Page
Western Air Lines v. Flight Engineers International Association, 194 F. Supp. 908 (S.D. Cal. 1961)	7
Statutes:	
Age Discrimination in Employment Act of 1967, *as amended*, 29 U.S.C. § 621 *et seq.*	*passim*
29 U.S.C. § 621(b) (1982)	14
29 U.S.C. § 623(a)(1) (1982)	8, 14, 45
29 U.S.C. § 623(a)(2) (1982)	8, 14, 45
29 U.S.C. § 623(f)(1) (1982)	8, 16, 17, 28, 29, 44, 45
29 U.S.C. § 623(f)(2) (1982)	8, 17, 44
29 U.S.C. § 623(f)(3) (1982)	44
Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.*	48
42 U.S.C. § 2000e-14 (1970)	14
42 U.S.C. § 2000e-2(e) (1982)	16
Railway Labor Act, 46 U.S.C. § 184 (1982)	8
Federal Aviation Act, 49 U.S.C. § 1301 *et seq.*	3
49 U.S.C. § 1348(a), (c) (1982)	32
49 U.S.C. § 1421 (1982)	40
49 U.S.C. § 1421(b) (1982)	11, 40, 43
49 U.S.C. § 1421(d) (1982)	40
49 U.S.C. § 1424 (1982)	11
Regulations:	
14 C.F.R. § 121.383(c) (1984)	5, 40
14 C.F.R. § 121.385(a) (1984)	32
14 C.F.R. § 121.385(b) (1984)	33
14 C.F.R. § 121.387 (1984)	32
29 C.F.R. § 1625.6(b) (1982)	23
24 Fed. Reg. 9776 (1959)	31, 39
49 Fed. Reg. 14692 (April 12, 1984)	5, 31, 40
Legislative History	
Age Discrimination in Employment Act, Hearings on S.830 and S.788 before the Subcomm. on Labor of the Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. (1967)	15, 16

TABLE OF AUTHORITIES—Continued

	Page
Age Discrimination in Employment Act, Hearings on H.R. 3651, H.R. 3768 and H.R. 4221 before the General Subcomm. on Labor of the House Comm. on Education and Labor, 90th Cong., 1st Sess. (1967)	15, 16
113 Cong. Rec. 31254 (1967)	15
113 Cong. Rec. 34752 (1967)	15
113 Cong. Rec. 34747 (1967)	16
113 Cong. Rec. 34742 (1967)	15
113 Cong. Rec. 35053 (1967)	16
U.S. Dep't Of Labor Report To The Congress On Age Discrimination In Employment Under § 715 of the Civil Rights Act of 1965 (1967)	14-15
Other Authorities	
2A *Moore's Federal Practice*, ¶ 8.27[3]	45
Note, *Age Discrimination in Employment Act of 1967*, 90 Harv. L. Rev. 380 (1967)	15, 26, 37

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1545

WESTERN AIR LINES, INC.,
Petitioner,

v.

CHARLES G. CRISWELL, ALBERT RON
and RULON H. STARLEY,
Respondents.

WESTERN AIR LINES, INC.,
Petitioner,

v.

WESTCOT B. STONE, III, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF WESTERN AIR LINES, INC.

OPINIONS BELOW

The decision of the court of appeals is reported at 709 F.2d 544 (9th Cir. 1983) and appears at pages A1-A30 of the Appendix to the Petition for a Writ of Certiorari. The district court rendered two opinions in *Criswell, et al. v. Western Air Lines, Inc.* The first is officially reported at 514 F.Supp. 384 (C.D. Cal. 1981) and appears at pages A31-A53 of the Appendix to the Petition for a Writ of Certiorari. The district court's second opinion is unpublished and appears at pages A60-A66 of the Ap-

pendix to the Petition for a Writ of Certiorari. The district court in *Stone v. Western Air Lines, Inc.* rendered three opinions. The first is unpublished and appears at pages A95-A100 of the Appendix to the Petition for a Writ of Certiorari. The second is reported at 544 F. Supp. 33 (C.D. Cal. 1982) and appears at pages A101-A111 of the Appendix to the Petition for a Writ of Certiorari. The third is unpublished and appears at pages A112-A117 of the Appendix to the Petition for a Writ of Certiorari.

JURISDICTION

On March 16, 1984, Western Air Lines, Inc. timely filed a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. The Petition was granted by order of this Court entered October 1, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTES AND REGULATIONS INVOLVED

The Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 621 *et seq.*, provides in pertinent part:

29 U.S.C. § 623(a) (1982):

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. § 623(f) (1982):

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(3) to discharge or otherwise discipline an individual for good cause.

The Federal Aviation Act of 1958, as amended, 49 U.S.C. § 1301 *et seq.*, provides in pertinent part:

49 U.S.C. § 1302(a)(2) (1982):

(a) In the exercise and performance of its powers and duties under this chapter, the [Civil Aeronautics] Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

. . .

(2) the prevention of any deterioration in established safety procedures, recognizing the clear intent, encouragement, and dedication of the Congress to the furtherance of the highest degree of safety in air transportation and air commerce, and the maintenance of the safety vigilance that has evolved within air trans-

portation and air commerce and has come to be expected by the traveling and shipping public.

49 U.S.C. § 1421(b) (1982):

(b) In prescribing standards, rules, and regulations, and in issuing certificates under this subchapter, the Administrator shall give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest.

49 U.S.C. § 1424(a) (1982):

(a) The Administrator is empowered to issue air carrier operating certificates and to establish minimum safety standards for the operation of the air carrier to whom any such certificate is issued.

The Federal Aviation Regulations, 14 C.F.R. Part 121, provide in pertinent part:

14 C.F.R. § 121.383(c) (1984):

No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday.

STATEMENT OF THE CASE

Western Air Lines, Inc. ("Western") is a federally certificated air carrier engaged in the business of providing safe transportation of passengers by air. Western operates several different types of aircraft, including the Boeing 727 and the McDonnell-Douglas DC-10, both of which were designed to be operated by three crew members. Western flies these aircraft with a Captain, First Officer, and Second Officer. The Captain performs the duties of pilot in command. The First Officer acts as copilot and the Second Officer performs the duties of flight engineer. The Federal Aviation Administration ("FAA") prohibits Western from allowing a Captain or First Officer to continue flying past his 60th birthday for reasons of flight safety. 14 C.F.R. § 121.383(c) (1984) ("FAA Age 60 Rule"). Western does not allow a Second Officer to continue flying past his 60th birthday, also for reasons of flight safety. Plaintiffs maintain that Western's policy constitutes unlawful age discrimination under the Age Discrimination in Employment Act of 1967, *as amended*, 29 U.S.C. § 621, *et seq.* (1982) ("ADEA" or "Act").

Central to Western's philosophy of flying is a coordinated crew concept in which cockpit duties are divided among all three crew members. Each crew member has specific duties to perform during all stages of a flight—no crew member is redundant. Each crew member coordinates his functions with and relies on information from the other crew members. Although only the Captain and First Officer actually manipulate the flight controls, under Western's system all three crew members actively participate in the operation of the aircraft.

FAA Age 60 Rule

The FAA Age 60 Rule prohibiting Western's pilots and copilots from serving past their 60th birthday is one of the *minimum* safety standards established for the airline industry. The Rule was adopted on March 15, 1960, and has been the subject of considerable scrutiny as individual pilots have sought exemptions from its prohibition. Its justification has been extensively studied and reexamined and ultimately reaffirmed by the FAA as recently as April 12, 1984. The Rule is based on the fact that "the risks of suffering incapacitating medical events and of adverse psychological emotional and physical changes rise" with advancing age. While the Rule is arbitrary in the sense that it may exclude some pilots who could perform well, it is a recognition of the fact that there is "a present inability to distinguish those pilots who, as a consequence of aging, present a threat to air safety from those who do not." 49 Fed. Reg. 14692, 14695 (April 12, 1984).

The FAA has never granted an exemption from the Age 60 Rule, regardless of the impressiveness of the individual pilot's health or medical record. *Keating v. Federal Aviation Administration*, 610 F.2d 611 (9th Cir. 1979). Western relied on the same medical evidence and rationale supporting the FAA Age 60 Rule in prohibiting its Second Officers from flying past age 60. Those individuals are, of course, subject to the same unpredictable risks of incapacitation as Western's Captains and First Officers and, given Western's method of operation, are as necessary to the safety of its flight operations.

The Challenged Employment Decisions

Prior to 1961, Western staffed the third crew member position in its aircraft with professional flight engineers. Beginning in February of 1961, Western began staffing that position with pilots. Since that time, all cockpit crew members have been part of the same job classification and on the same seniority list. *See* Pilot Agreement (JA 71).[1] There is a natural line of progression from the entry level position of Second Officer to First Officer to Captain. This line of progression allows new pilots to learn Western's procedures by participating in the operation of its aircraft through the performance of the duties of the flight engineer.

When a new pilot's seniority is adequate to allow promotion from the Second Officer position, he or she must qualify for and advance to the First Officer position. Likewise, a pilot in the First Officer position must qualify for and advance to the position of Captain when his seniority allows it. Those who are unable to meet the qualifications of the next higher position are removed from the cockpit. As a result of this "up or out" policy,

[1] Citations in the form "JA ——" are to the Joint Appendix and in the form "A——" are to the Appendix to the Petition for a Writ of Certiorari. Citations in the form "R.T.——" are to Record Transcript.

Western does not have "career" flight engineers or co-pilots.[2] Moreover, Western's pilots also bid for positions in different types of aircraft on the basis of seniority, with more senior pilots generally receiving positions in larger aircraft. Thus, each Western pilot is moving through Western's system, advancing in terms of position held within the cockpit and type of equipment flown.

Plaintiffs Criswell and Starley advanced through Western's system to the position of DC-10 Captain. The DC-10 is the largest aircraft flown by Western. In late 1977, at age 59, and thus on the eve of the end of their service as Captains due to the FAA Age 60 Rule, these two Captains sought to reverse the normal order of progression and use their seniority to bid down to the Second Officer position. Western rejected these bids on the ground that downward movement along the pilot line of progression was never contemplated by Western's seniority system. Both Captains filed grievances which were

[2] Plaintiff Ron in the *Criswell* action and plaintiff White in the *Stone* action are two of ten cockpit crew members at Western who are exceptions to this policy. On February 17, 1961, in protest of a National Mediation Board decision which favored staffing the flight engineer position with pilots, the flight engineers on all U.S. airlines went on strike. Western was the only carrier that attempted to continue its operation during the strike. Western requested each of its flight engineers to report to work and if he refused, he was replaced by a pilot-trained employee. Only ten flight engineers, including Ron and White, returned to work, and the rest were permanently replaced with pilot Second Officers. *See Western Air Lines v. Flight Engineers International Ass'n*, 194 F.Supp. 908 (S.D. Cal. 1961).

In recognition of the fact that the ten flight engineers who returned to work in 1961 were not hired as pilots, Western agreed to exempt them from the operation of its "up or out" policy. Pilot Agreement effective September 1, 1977, Section 2(D) and attached Memorandum of Agreement, p. 131 (JA 71). Thus, plaintiffs Ron and White were allowed to remain as "career" Second Officers rather than being required to qualify for and advance to the First Officer position with their pilot peers.

ultimately heard by the Western Air Lines Pilots System Board of Adjustment established under the Railway Labor Act, 46 U.S.C. § 184 (1982). The System Board sustained Western's interpretation of the seniority system and denied both grievances.

Neither Captain sought judicial review of the System Board decision. Instead, Captains Criswell and Starley requested that they be allowed to transfer to and continue working in the Second Officer position past the age of 60. At about this same time, Second Officer Ron also requested that he be allowed to continue flying in the Second Officer position past age 60. Western denied all three requests.

The Proceedings Below

Plaintiffs in the *Criswell* action, Criswell, Ron and Starley, filed suit on June 6, 1978, alleging that Western's refusal to let them serve as Second Officers past age 60 was based on unlawful age discrimination in violation of the ADEA. 29 U.S.C. § 623(a) (1982). Western defended its actions in denying the requests of Captains Criswell and Starley to transfer to the Second Officer position as having been based on reasonable factors other than age and on the neutral operation of a bona fide seniority system. *See* 29 U.S.C. 623(f)(1), (2) (1982). Western also defended its actions as to each plaintiff on the ground that age is a bona fide occupational qualification ("BFOQ") for all three of its cockpit positions. 29 U.S.C § 623(f)(1) (1982).

The action was tried to a jury in November of 1980. The trial judge instructed the jury that Western had the burden of proving that its decision to deny the requested transfers to the Captain plaintiffs was based on reasonable factors other than age (JA 56, 57, 62-63). The court instructed the jury that it could consider the System Board interpretation of Western's seniority system as evidence in determining whether Western's reliance on the pilot seniority system met its burden of proving that its decision was based on reasonable factors other than age (JA 62-63).

On the BFOQ issue, the trial court instructed the jury that it was to decide whether Western *had proved* (1) that it was highly impractical to deal with each Second Officer over age 60 on an individual basis to determine his particular ability to perform his job *and* (2) that there was no other way to determine who possesses traits which preclude safe job performance other than through knowledge of age (JA 61-62). The jury was not instructed that it was to defer to Western's safety expertise and judgment in any way or even consider the impact of Western's policy on the safety of its passengers. The court did instruct the jury that even if Western proved the elements in the BFOQ instruction, plaintiffs could still prevail if they could show "that the reasons stated in defendant's case are merely pretexts for age discrimination" (JA 63-64).[3] The jury returned a general verdict for plaintiffs in November, 1980.

After taking some additional evidence, the district court entered judgment for plaintiffs and permanently enjoined Western from prohibiting its flight deck crew members, including Second Officers, to work as Second Officers past age 60. The district court entered a Memorandum Opinion in support of its decision (A31-A53). In considering Western's defense that age less than 60 was a BFOQ for its Second Officer position, the court

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[3] Since the BFOQ defense is a defense to intentional age discrimination, it cannot be overcome by a finding that the employer's real motive was to discriminate on the basis of age. *Levin v. Delta Air Lines, Inc.*, 730 F.2d 994 (5th Cir. 1984); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 804-05 (1973).

Presumably this instruction invited the jury to inquire into the *original* motive of Western in adopting its policy and deny the defense even if it was *currently* justified by objective evidence. The Ninth Circuit held this charge to be harmless error (A18-A19).

acknowledged Western's evidence that persons over age 60 are subject to increasing risk of unpredictable incapacitation (A36). However, the court noted that there was evidence to the contrary on this issue and, in any event, because Second Officers did not appear to be as important to flight safety as Captains and First Officers, incapacitation of Second Officers was not a legitimate concern (A37-A38). In essence, the court, like the jury before it, substituted its judgment for that of Western in deciding that the safety risk involved in allowing Second Officers to fly past age 60 was worth taking.

The court also ruled that Western failed to prove that its decision not to allow the Captain plaintiffs to bid down to the Second Officer position was based on reasonable factors other than age (A43). In addressing the operation of the pilot seniority system, the court considered "downbids" which occurred in a variety of other situations and determined that the Pilots System Board and the parties to the Pilot Agreement were simply wrong in concluding that the "downbids" sought by the DC-10 Captains to DC-10 Second Officer were not allowed by the Pilot Agreement (A41-A43).[4] Final judgment

[4] The district court's conclusion that "downbidding" is a frequent occurrence at Western shows a fundamental misunderstanding of Western's policies. The court compared the "downbid" by the plaintiff DC-10 Captains to Second Officer positions in this case to numerous "downbids" caused by a curtailment of flights, resulting in fewer available positions. Any seniority system necessarily allows for downward movement when there is a contraction in available work. The relative seniority order of the workforce is, of course, maintained in that situation. The "downbids" sought here, on the other hand, would have inverted the normal relative seniority order and made the pilot occupying the most junior position in the cockpit the most senior pilot on board. The only "downbids" even arguably comparable to those sought by the plaintiff DC-10 Captains were four medical downbids. This misunderstanding of "downbids" probably explains the inconsistency between the district court's opinion and the Pilots System Board's conclusion that "downbids" were permitted "only in rare and carefully defined circumstances" (A41).

and a permanent injunction were entered by the district court on May 12, 1981 (A54-A58).

On October 26, 1981, counsel for the *Criswell* plaintiffs filed the *Stone* action on behalf of eight DC-10 Captains and one career DC-10 Second Officer, all of whom were nearing age 60. That case was also assigned to the district court judge handling the *Criswell* action. All nine plaintiffs sought preliminary injunctions allowing them to fly as Second Officers past age 60. In December 1981, the preliminary injunction request by the career Second Officer was granted, while the requests of the Captain plaintiffs were denied (A100). Western appealed the preliminary injunction to the Ninth Circuit Court of Appeals, where it was consolidated with the *Criswell* action.

The Ninth Circuit affirmed both the jury verdict and the equitable relief in the *Criswell* action, as well as the granting of the preliminary injunction in the *Stone* action.

SUMMARY OF ARGUMENT

The airline industry is one in which safety is of critical importance. It is only necessary to consider the staggering death tolls that have followed major aircraft accidents to confirm this fact. As common carriers entrusted with the lives and well-being of their passengers, federally certificated air carriers, such as Western, have a statutory duty to conduct their operations "with the highest possible degree of safety." 49 U.S.C. § 1421(b) (1982); *see also* 49 U.S.C. § 1424 (1982). This duty includes the obligation to employ at all times the most highly qualified persons in positions affecting the safety of their passengers.

The potential for loss of life as a result of aircraft accidents is so great that commercial airlines must be afforded flexibility and discretion in setting job qualifications for employees in positions affecting inflight safety. While commercial airlines are charged by federal law with a duty to acquire and exercise expertise in the highly specialized field of air safety, juries simply do not possess the skill or experience to promulgate flight safety rules for the air transportation industry.

Moreover, where qualified experts disagree as to the present capability of medical science to determine which persons over a certain age possess the qualifications necessary to perform safely and efficiently the duties of a position essential to the safe operation of an aircraft, the airlines must be allowed to adopt a conservative stance, erring, if at all, on the side of safety. To require an airline to prove medical science issues to a certainty in order to justify its safety standards would wholly disregard overriding societal interests in public safety.

Nevertheless, in the present case, through a combination of erroneous and ill-considered instructions, a jury of laymen was not only encouraged to substitute its judgment for that of an airline respecting job qualifications for essential flight personnel, but was allowed to resolve a conflict among medical experts concerning the present ability of medical science to predict which persons over age 60 possess the qualifications necessary to perform safely the duties of a Second Officer. Western submits that the failure of the lower courts in this case to consider seriously the safety interests of the traveling public or to accord any discretion to Western in selecting and evaluating flight safety standards is not only short-sighted and dangerous, but inconsistent with controlling legal principles.

In order to establish a BFOQ defense in ADEA cases involving important considerations of public safety, an

employer must show (1) that the duties of the job in question are related to the essence of his business and that the qualifications selected by the employer for that job are reasonable in light of the safety risks, and (2) that there is reasonable cause to believe, that is, a factual basis for believing, *either* that most persons excluded by the challenged age limitation do not possess the selected qualifications *or* that it is impossible or impractical to deal with such persons on an individual basis, thereby justifying a reasonable general rule. Moreover, where the purpose of a challenged employment policy is to promote safety and minimize the risk of injury to third parties, the employer must be afforded flexibility and discretion in selecting specific safety standards and in judging their reasonableness.

Analyzed in light of these standards, it is clear that the trial court's BFOQ instruction in this case was deficient in several respects. First, the charge failed to even mention the deference due Western's selection of job qualifications for the position of Second Officer that are reasonable in light of the safety risks. Second, the charge instructed the jury that Western had the burden of proving *in fact* that it is impossible or impractical to determine, on an individual basis, which persons over age 60 do and do not possess the qualifications Western has determined are necessary for the safe and efficient operation of the duties of a Second Officer. Finally, the instruction totally disregarded the federal mandate that Western conduct its operations with the "highest possible degree of safety."

In addition to its erroneous BFOQ instruction, the district court erred by instructing the jury that Western had the burden of proving, *by a preponderance of the evidence*, that its refusal to allow plaintiffs Criswell and Starley to bid down to the position of Second Officer was motivated by "reasonable factors other than age." The defense that an employment decision is based on "rea-

sonable factors other than age" is not an affirmative defense, but rather a denial of plaintiffs' *prima facie* case of age discrimination. The error in the district court's charge was fundamental. It improperly placed the burden on Western to prove that *age was not a determining factor*, when it was plaintiffs' burden at all times to prove that *age was* a *determining factor*.

ARGUMENT

I. The Trial Court Erred In Charging The Jury On The BFOQ Standard.

The ADEA makes it unlawful for an employer to discriminate against an employee between the ages of 40 and 70 "because of such individual's age." [5] The purpose of the Act was threefold: to promote employment of older workers based on ability rather than age; to prohibit arbitrary age discrimination in employment; and to aid employers and workers in studying the relationship between age and employment. 29 U.S.C. § 621(b) (1982) (statement of congressional purpose).[6]

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[5] Section 4(a) of the Act makes it unlawful for an employer:

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

29 U.S.C. § 623(a)(1), (2) (1982).

[6] The ADEA had its origins in a study undertaken by the Secretary of Labor pursuant to a statutory mandate contained in § 715 of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-14 (1970); *see U.S. Dep't of Labor Report To the Congress On Age Discrimination In Employment Under § 715 of the Civil Rights Act of 1965* (1967). While the study recognized the problems associated with arbitrary age discrimination and its impact on older workers, it emphasized that there was "no evidence of prejudice based on dislike or intolerance for the older worker." *Id.* at 6. Rather, the study revealed that arbitrary age discrimination was based on erroneous assumptions concerning the effects of age on ability adopted by employers out of concern for economic efficiency. *Id.* at 8; *see generally* Note, *Age Discrimination in Employment Act of 1967*, 90 Harv. L. Rev. 380 (1967).

This view was reiterated during the congressional debates on the ADEA:

> Age discrimination is not the same as the insidious discrimination based on race or creed prejudices and bigotry. These discriminations result in unemployment because of feelings about a person entirely unrelated to his abilities to do a job. This is hardly a problem for the older job seeker. Discrimination arises for him because of assumptions that are made about the effects of age on performance.

113 *Cong. Rec.* 34742 (1967) (remarks of Rep. Burke); *see also id.* at 34752 (remarks of Rep. Dwyer); *id.* at 31254 (remarks of Sen. Javits).

[7] *See* Age Discrimination in Employment Act, Hearings on S.830 and S.788 before the Subcomm. on Labor of the Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. 43 (1967) (hereinafter *"Senate Hearings"*) (testimony of Secretary of Labor Wirtz); Age Discrimination in Employment Act, Hearings on H.R. 3651, H.R. 3768 and H.R. 4221 before the General Subcomm. on Labor of the House Comm. on Education and Labor, 90th Cong., 1st Sess. 8 (1967) (hereinafter *"House Hearings"*) (testimony of Secretary of Labor Wirtz); *see also Equal Employment Opportunity Commission v. Wyoming*, 460 U.S. 226, 233, 103 S.Ct. 1054, 1058 (1983) (recognizing that criteria based on age are sometimes justified under the ADEA).

[8] As then Secretary of Labor, W. Willard Wirtz, explained during his testimony before the House Subcommittee on Labor:

An examination of the language and legislative history of the ADEA demonstrates that the Act was intended to prohibit "arbitrary" and "unjust" discrimination,[7] while recognizing fully the legitimacy of employment practices that take into account the relationship between age and ability.[8] Thus, while the ADEA generally pro-

hibits age discrimination in employment, section 4(f) of the Act expressly permits differentiations based on age "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1) (1982).[9]

In defense of plaintiffs' ADEA claims in this case, Western maintained, *inter alia*, that its policy requiring Second Officers to cease flying at age 60 is a bona fide occupational qualification reasonably necessary to the normal operation of its business.[10] The question pre-

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> The Bill recognizes fully the legitimacy of an employer's decisions, practice, and arrangements which take account of . . . the relationship between age and capacity. If someone cannot perform his or her job, the bill provides no relief simply because the individual is between the ages of 40 and 65.

House Hearings, *supra* note 7, at 8; *see also Senate Hearings*, *supra* note 7, at 39; 113 *Cong. Rec.* 34747 (1967) (remarks of Rep. Dent); 113 *Cong. Rec.* 35053 (1967) (remarks of Sen. Yarborough).

[9] Section 4(f)(1) of the ADEA provides:

> It shall not be unlawful for an employer, employment agency, or labor organization:
>
> (1) To take any action otherwise prohibited under subsections (a), (b), (c) or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age.

29 U.S.C. § 623(f)(1) (1982). Although this Court indicated in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), that a similar provision in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(e) (1982), was to be "narrowly construed," the language, legislative history and purpose of the ADEA suggest that a narrow construction of § 4(f)(1) would not be appropriate. *See Senate Hearings*, *supra* note 7 at 39 (Testimony of Secretary of Labor Wirtz noting that BFOQ exception under ADEA is "obviously broad").

[10] Western also maintained that the employment practices challenged by plaintiffs Criswell and Starley were based on reasonable factors other than age within the meaning of § 4(f)(1) of the Act, 29 U.S.C. § 623(f)(1) (1982), *see infra* at 43-48, and that their claims were barred by operation of § 4(f)(2) of the Act, which provides an exemption from the ADEA's prohibitions for actions taken pursuant to a "bona fide seniority system." 29 U.S.C. § 623(f)(2) (1982).

sented for review is whether the jury was instructed to evaluate Western's BFOQ defense under the correct legal standard.[11]

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[11] The district court's instruction on the BFOQ defense read as follows:

> If you find that plaintiffs have persuaded you by a preponderance of the evidence that their involuntary retirements were the result of policies in which age discrimination was a determining factor, then you must consider defendant's defense that age is a "bona fide occupational qualification" for its Second Officers (flight engineers). This defense is usually abbreviated "BFOQ." The BFOQ defense is available only if it is reasonably necessary to the normal operation—essence—of defendant's business. In this regard, I instruct you that the normal operations—essence—of Western's business is the safe transportation of air passengers.
>
> The burden of proof to show a BFOQ is on the defendant. If defendant establishes such a BFOQ by a preponderance of the evidence, then its age discrimination is lawful under the ADEA.
>
> One method by which defendant Western may establish a BFOQ in this case is to prove:
>
> (1) That in 1978, when these plaintiffs were retired, it was highly impractical for Western to deal with each Second Officer over 60 on an individualized basis to determine his particular ability to perform his job safely, and
>
> (2) That some Second Officers (flight engineers) over age 60 possess traits of a physiological, psychological, or other nature which precludes safe and efficient job performance that cannot be ascertained by means other than knowing their age.
>
> In evaluating the practicability to defendant Western of dealing with Second Officers over age 60 on an individualized basis, with respect to the medical testimony you should consider the state of the medical art as it existed in July, 1978.

A. *The Appropriate BFOQ Standard In Safety Cases.*

The leading statement of the test to be applied in evaluating the adequacy of a BFOQ defense under the ADEA was developed by the Fifth Circuit Court of Appeals in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976). In *Tamiami*, the Fifth Circuit held that the ADEA did not prohibit a bus company from setting a maximum hiring age of 40 for new drivers. Building on two sex discrimination cases,[12] the court established a two-pronged test to judge *all* BFOQ claims. The first prong of that test requires the employer to show that "the job qualifications which [he] invokes to justify his discrimination [are] *reasonably necessary* to the essence of his business." *Id.* at 36 (emphasis in original). Stated otherwise, the job qualifications must relate to "abilities [that] are *necessary* to the business, not merely tangential." *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971) (emphasis in original).[13]

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[12] *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969); *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

[13] *Diaz* involved a challenge to Pan Am's policy of refusing to hire males as flight attendants. Pan Am asserted a BFOQ defense based on a contention that most males were not qualified to perform the "non-mechanical" duties of a flight attendant. In rejecting that defense, the court construed the statutory requirement that a BFOQ be "reasonably necessary" to the operation of the business as limiting qualification for the defense to those cases in which "the *essence* of the business operation would be undermined by not hiring members of one sex exclusively." 442 F.2d at 388 (emphasis in original). Finding that the "non-mechanical" duties of a flight attendant were not reasonably necessary to the safe transportation of passengers, the court held that Pan Am was precluded from justifying its sex discrimination as a BFOQ under *Weeks*. In *Tamiami*, the court further noted that "the *Diaz* requirement of a correlation between the job description and the essence of the business operation is a condition precedent to the application of *Weeks'* BFOQ exception to the ban on hiring discrimination." 531 F.2d at 235 n.27.

Under the second prong of the test, the employer must show that:

> [H]e had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all [of the persons excluded by the challenged age limitation] would be unable to perform safely and efficiently the duties of the job involved.

Usery v. Tamiami Trail Tours, Inc., 531 F.2d at 235, *quoting Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 235 (5th Cir. 1969).[14] However, an employer who cannot carry this burden may nevertheless apply a "reasonable general rule," if he demonstrates that "it is impossible or impractical to deal with [such persons] on an individualized basis." 531 F.2d at 235, 236; *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d at 235 n.5. The *Tamiami* court explained that one method by which an employer could carry his burden under the latter alternative would be "to establish that some members of the discriminated against class possess a trait precluding safe and efficient job performance that cannot be ascertained by means other than knowledge of the applicant's membership in the class." 531 F.2d at 235.[15]

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[14] In *Weeks*, the Fifth Circuit found Southern Bell liable for refusing to allow female employees to bid for the position of switchman. In doing so, the court rejected the defendant's BFOQ defense that a switchman's duties were "strenuous" and required the ability to lift heavy equipment. *Id.* at 234. Noting that the defendant had produced no evidence concerning the general lifting abilities of women, but rather had relied on "stereotyped characterizations" that few if any women could safely lift heavy weights, the court found that Southern Bell had failed to meet its burden of proving that it had "reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." *Id.* at 235.

[15] In articulating and applying the *Tamiami* BFOQ test, it is important to distinguish between the Fifth Circuit's use of the term

Having articulated the test for evaluating BFOQ claims generally, the *Tamiami* court proceeded to refine the application of that test in cases involving important considerations of public safety. The court recognized that where the purpose of an employment policy is to promote safety and minimize the risk of injury to third parties, courts and juries simply do not possess the expertise with which to substitute their judgments for those of the employer. The court thus concluded that employers must be afforded flexibility and discretion both in "selecting specific safety standards and in judging their reasonableness." 531 F.2d at 236 n.30. The court

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"job qualification" and the broader statutory term "bona fide occupational qualification." As used in *Tamiami*, the term "job qualification" refers to an *ability* to perform the *duties* of a particular job at a *required level of competence*. The term "bona fide occupational qualification," however, is a term of art and best understood as referring to a *trait* (*e.g.*, age under 40) that is indicative of the presence or absence of an *ability* to perform the *duties* of a particular job at a *required level of competence*. The first prong of the *Tamiami* test examines the relationship between a job qualification (as defined above) and the essence of the employer's business. The second prong of the test examines the efficacy of a *trait* in selecting or excluding persons who do or do not possess the job qualification.

Thus, in *Diaz* the court examined the relationship between Pan Am's business (the safe transportation of passengers) and a job qualification requiring flight attendants to possess the *ability* to perform certain "non-mechanical" duties. Finding that the job qualification (*i.e.* the ability to perform "non-mechanical" duties) was not reasonably necessary to the essence of Pan Am's business, it was unnecessary for the court to consider whether the *trait* (*i.e.* being female) used by Pan Am was effective in predicting which persons would or would not meet the job qualification. By contrast, in *Weeks* the court found that the job qualification (*i.e.* the ability to perform the duties of a switchman) was reasonably necessary to the essence of the defendant telephone company's business, and therefore, was required to determine whether there was an adequate factual basis for the defendant's belief that the *trait* (*i.e.* being male) was effective in identifying those persons who could and could not satisfy the job qualification.

further stated that in the context of industries involving passenger safety:

> [T]he employer must be afforded *substantial discretion* in selecting specific standards which, if they err at all, should err on the side of preservation of life and limb. The employer must of course show a *reasonable basis* for its assessment of the risks of injury/death. But it cannot be expected to establish this to a certainty, for certainty would require running the risk until a tragic accident proved that the judgment was sound.

Id. at 238 (emphasis added). With reference to the proper evaluation of an employer's showing under the first prong of the BFOQ test, the court added:

> The greater the safety factor, measured by the likelihood of harm and the probable severity of that harm in case of an accident, the more stringent may be the job qualifications designed to insure [safety].

Id. at 236.

Turning to the case before it, the *Tamiami* court first noted that, as a regulated motor carrier, the essence of the defendant's business was the safe transportation of passengers. *See id.* at 227. Applying the two-prong BFOQ test, as refined in recognition of the presence of the safety factor, the court held that the defendant bus company had "unquestionably satisfied the [first] prong of the BFOQ test" by showing that its "stringent job qualifications" [16] for bus drivers were related to the business and were "reasonable in light of the safety risk." *Id.* at 236. With respect to the second prong of the test,

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[16] In *Tamiami*, the employer's "stringent job qualification" was an *ability* to safely and efficiently perform rigorous "Extra Board" duties, which required a high degree of driving skill, mental alertness and physical stamina, as well as an absence of physical, mental or organic defects of a nature affecting one's ability to operate a motor vehicle safely. *Id.* at 233.

the court upheld the trial court's finding that available medical tests could not distinguish those individuals over age 40 not yet affected by crucial age-related impairments "with sufficient reliability to meet the *special safety obligations* of motor carriers of passengers." *Id.* at 238, *quoting Hodgson v. Tamiami Trail Tours, Inc.*, 4 Empl. Prac. Dec. (CCH) ¶ 7795 at 6051 (S.D. Fla. 1972).[17]

Although often misstated, and occasionally misapplied, the two-prong test for evaluating BFOQ claims formulated in *Tamiami* has been adopted by virtually every circuit that has considered the scope of the BFOQ exception. *See, e.g., Mahoney v. Trabucco*, 738 F.2d 35 (1st Cir. 1984); *Air Line Pilots Association, International v. Trans World Airlines, Inc.*, 713 F.2d 940 (2d Cir. 1983), *cert. granted sub nom. Trans World Airlines, Inc. v. Thurston*, 104 S.Ct. 1412 (1984); *Arritt v. Grisell*, 567 F.2d 1267 (4th Cir. 1977); *Equal Employment Opportunity Commission v. University of Texas Health Science Center*, 710 F.2d 1091 (5th Cir. 1983); *Tuohy v. Ford Motor Co.*, 675 F.2d 842 (6th Cir. 1982); *Orzel v. City of Wauwatosa Fire Department*, 697 F.2d 743 (7th Cir.), *cert. denied*, 104 S.Ct. 484 (1983); *Hoefelman v. Conservation Commission of Missouri Department of Conservation*, 718 F.2d 281 (8th Cir. 1983); *Harriss v. Pan American World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980); *Stewart v. Smith*, 673 F.2d 485 (D.C. Cir. 1982).[18]

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[17] In other words, the court found that the *trait* of age over 40 was effective in screening out those persons who did not possess the *stringent job qualifications* that had passed muster under the first part of the test.

[18] *See also Monroe v. United Air Lines*, 736 F.2d 394 (7th Cir. 1984); *Equal Employment Opportunity Commission v. County of Los Angeles*, 706 F.2d 1039 (9th Cir. 1983); *Smallwood v. United Air Lines, Inc.*, 661 F.2d 303 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982); *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977); *Beck v. Manheim*, 505 F.Supp. 923 (E.D. Pa. 1981); *Aaron v. Davis*, 414 F.Supp. 453 (E.D. Ark. 1976). The BFOQ regulations adopted by the EEOC also closely track the two-pronged test formulated in *Tamiami*. *See* 29 C.F.R. § 1625.6(b) (1984).

Similarly, with the notable exception of the lower courts in this case, every court that has considered the issue of safety in the context of analyzing BFOQ claims has concluded that an employer must be given greater leeway where its operations involve the safety of third parties. *See, e.g., Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977) (prison guards); *Condit v. United Air Lines, Inc.*, 558 F.2d 1176 (4th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978) (flight attendants); *Arritt v. Grisell*, 567 F.2d 1267 (police officers); *Johnson v. American Airlines, Inc.*, No. 83-1610 (5th Cir. Nov. 8, 1984) (flight officers); *Levin v. Delta Air Lines, Inc.*, 730 F.2d 994 (5th Cir. 1984) (flight attendants); *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 24 (bus drivers); *Tuohy v. Ford Motor Co.*, 675 F.2d 842 (company pilot); *Orzel v. City of Wauwatusa Fire Department*, 697 F.2d at 755 (assistant fire chief); *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), *cert. denied sub nom. Brennan v. Greyhound Lines, Inc.*, 419 U.S. 1122 (1975) (bus drivers); *Hoefelman v. Conservation Commission of Missouri Department of Conservation*, 718 F.2d 281 (chief pilot); *Equal Employment Opportunity Commission v. County of Santa Barbara*, 666 F.2d 373, 377 (9th Cir. 1982) (correction officers); *Harriss v. Pan American World Airways, Inc.*, 649 F.2d 670 (flight attendants); *Murnane v. American Airlines, Inc.*, 667 F.2d 98, 101 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982) (pilots). The basis for this conclusion is unquestionably sound—the risk of error when public safety is implicated is to be resolved in favor of safety. *Equal Employment Opportunity Commission v. University of*

Texas Health Science Center, 710 F.2d at 1097 (J. Higginbotham, concurring specially).

The only apparent confusion among the circuits respecting the proper standard for evaluating BFOQ claims concerns the degree to which the safety factor is to be considered in applying the second prong of the *Tamiami* test and the nature of the employer's burden in attempting to show that individualized evaluations are not practical under the second alternative of that part of the test. The confusion surrounding these issues was engendered in large part by the *Tamiami* decision itself. In its zeal to correct what it perceived to be a misunderstanding of its decisions in *Weeks* and *Diaz* by the Seventh Circuit in *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859, the Fifth Circuit in *Tamiami* indicated that only the first and not the second part of the BFOQ test adjusts to the safety factor. 531 F.2d at 36. Moreover, the particular wording of the *Tamiami* opinion can be read as requiring employers (contending that individual examinations cannot separate the qualified from the unqualified) to demonstrate in fact that it is impossible or impractical to deal with members of the excluded class on an individual basis. *See id.* at 236. In applying the test to the case before it, however, it appears that the *Tamiami* court did consider the safety factor in evaluating the employer's BFOQ defense under the second prong of the test and imposed a correspondingly lighter burden on the employer to show that individualized evaluations were impossible or impractical. *See* 531 F.2d at 238 (upholding district court's finding that available medical tests could not separate the qualified from the unqualified "with sufficient reliability to meet the *special safety obligations* of motor carriers of passengers").[19]

[19] In any event, it is clear that even if the safety factor is not directly considered in evaluating the employer's BFOQ defense under the second prong of the test, it does indirectly affect that

While the wording of the *Tamiami* opinion can be read in different ways, the Fifth Circuit's position respecting the nature of an employer's burden under the second prong of the BFOQ test has since been clarified in *Equal Employment Opportunity Commission v. University of Texas Health Science Center*, 710 F.2d 1091. In that case, the court unequivocally held that under the second part of the test an employer need only show that it has:

> [R]easonable cause, that is, a factual basis, for believing *either* that all or substantially all persons within the excluded class would be unable to perform safely and efficiently the duties of the job *or* that it is impossible or impractical to deal with persons over the age limit on an individualized basis. *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 235-36 (5th Cir. 1976).

710 F.2d at 1093 (emphasis in original); *accord Johnson v. American Airlines, Inc.*, No. 83-1610 (5th Cir. Nov. 8, 1984) (age 60 limitation for flight officers upheld as BFOQ). At least where considerations of safety are present, other courts have agreed that an employer need only demonstrate a factual basis for its belief that individual evaluations cannot practically separate the qualified from the unqualified.[20] *Tuohy v. Ford Motor Co.*,

evaluation. Under the second part of the test, the fact finder must assess whether there is a factual basis for believing that a *trait* (*e.g.*, age over 40) is effective in screening out those persons who do not possess the *stringent job qualifications* found to be related to the business and reasonable in light of the *safety risks* under the first part of the test after according due deference to the employer's reasonable judgment. Under the second part of the test, the fact finder is *not* called upon to make its own *independant* assessment of whether persons possessing the trait can or cannot perform the job safely and efficiently.

[20] In *Dothard v. Rawlinson*, 433 U.S. 321, this Court applied a similar standard in a Title VII BFOQ case. Although stating that "it is impermissible under Title VII to refuse to hire . . . on the basis of stereotyped characterizations of the sexes," the Court upheld the employer's exclusion of women from serving as prison

675 F.2d at 846; *Hoefelman v. Conservation Commission of Missouri Department of Conservation*, 718 F.2d at 286 (McMillan, J., concurring); *see also* Note, *Age Discrimination in Employment Act of 1967*, 90 Harv. L. Rev. 380, 407 (1967) (suggesting that the safety factor is equally relevant to the strictness by which the efficacy of an age requirement and the practicality of individualized screening are to be judged). *But see Equal Employment Opportunity Commission v. City of St. Paul*, 671 F.2d 1162 (8th Cir. 1982).[21]

To require any greater showing on the part of an employer in cases involving important public safety concerns would create an intolerable situation. Where the only thing at stake is an individual plaintiff's interest in being free from employment discrimination, it might be appropriate to permit a jury to resolve a conflict among experts as to the capability of medical science to accu-

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guards because "[t]here is a *basis in fact for expecting* that sex offenders who have criminally assaulted women in the past would be moved to do so again if access to women were established within the prison." *Id.* at 335 (emphasis added).

[21] In *City of St. Paul*, the court interpreted the wording of the *Tamiami* decision as requiring an employer to *prove* that individualized determinations are impossible or impractical. *Id.* at 1168. Since the Eighth Circuit had already adopted the *Tamiami* approach in *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561, the court in *City of St. Paul* believed that it was bound by that construction. However, no reason was given by the court for applying different standards to the "all or substantially" and "cannot distinguish" alternatives under the second part of the test. Moreover, it is significant to note that both *City of St. Paul* and *McDonnell Douglas* were decided prior to *E.E.O.C. v. University of Texas Health Science Center*, 710 F.2d 1091, in which the Fifth Circuit clarified its holding in *Tamiami* to make it clear that an employer need only demonstrate a factual basis for its belief that individual evaluations cannot practically separate the qualified from the unqualified. In any event, the Eighth Circuit's present position on this issue is unclear. *See Hoefelman v. Conservation Comm. of Missouri Dept. of Conservation*, 718 F.2d 281, 286 (McMillan, J. concurring).

rately predict, on an individual basis, which members of an excluded class do or do not possess the qualifications selected by the employer for a particular job. However, in cases involving important safety interests of third parties, the consequences of an incorrect decision must be considered. To require an employer to prove medical science issues to a certainty in the latter case would be to wholly disregard overriding societal interests in public safety.[22] *See Murnane v. American Airlines, Inc.*, 482 F.Supp. 135, 147 (D. D.C. 1979), *aff'd*, 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982) ("individual interest in being free of employment discrimination on account of age must give way to the societal interest in having the safest air transportation system possible"); *see also Air Line Pilot Association International v. Quesada*, 182 F.Supp. 595, 596 (S.D.N.Y. 1960), *aff'd*, 276 F.2d 892 (2d Cir. 1960), *cert. denied*, 366 U.S. 962 (1961) (noting that "[a]ny attempt to weigh the countervailing considerations of dollar loss [to pilots challenging the FAA's Age 60 Rule] . . . against the public safety in air carrier operations borders on vulgarity"); *cf. Dothard v. Rawlinson*, 433 U.S. 321, 335-36 (1977).[23]

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[22] In addition to humanitarian considerations, such a requirement would have serious practical consequences as well. In situations where reasonable people could differ, different juries would very likely reach different results. In addition, in cases such as the present one, where the question is whether the sciences have reached a sufficient level of competence in a certain area, a single employer could face the same questions week after week in suits brought by one or more employees. Every time a new treatise is written or another expert indicates his opinion, a previously unsuccessful claimant could come into court and allege that developments in the relevant field of expertise have changed the situation and that, therefore, an entirely new question is presented for determination. *See Tuohy v. Ford Motor Co.*, 490 F. Supp. 258, 263 n.3 (E.D. Mich. 1980), *rev'd on other grounds*, 675 F.2d 842 (5th Cir. 1982).

[23] In *Dothard*, this Court recognized that an individual's right to be free from arbitrary discrimination in employment is not to

Where qualified experts disagree as to whether persons over a certain age can be dealt with on an individual basis, an employer should be allowed to resolve that controversy in a conservative manner, erring, if at all, on the side of safety. *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d at 238. In short, where the lives of third parties hang in the balance, it is simply bad policy to permit juries to speculate concerning the sufficiency of medical evidence, and the ADEA should require no more of an employer than that he have a factual basis for believing that individualized evaluations are impractical.

Although the two-pronged BFOQ test developed by the Fifth Circuit in *Tamiami*, and later clarified in *Equal Employment Opportunity Commission v. University of Texas Health Science Center*, has never been expressly adopted by this Court, *see Dothard v. Rawlinson*, 433 U.S. at 333; *Equal Employment Opportunity Commission v. Wyoming*, 103 S. Ct. 1054, 1071-72 (1983) (Burger, C.J., dissenting), it has been generally accepted by the other circuits. Western believes that the test is workable and, if correctly articulated and applied, properly balances the sometimes competing interests of workers, employers and the public.[24]

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be determined in the abstract without regard to the burdens its exercise might impose on others. In upholding, as a BFOQ, a policy precluding employment of females as prison guards, the Court stated:

> The likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victim of the assault *but also the basic control of the penitentiary and protection of its inmates and the other security personnel.*

Id. at 336.

[24] Western does believe that much confusion could be avoided by restating the test in a manner that more clearly delineates the essential elements of a bona fide occupational qualification. In order to properly define and articulate the scope of the BFOQ exception contained in § 4(f)(1) of the ADEA, it is first necessary to examine and understand the plain meaning of the term "bona fide occupational qualification." This term is best understood as a *trait* (*e.g.*, age over 60) which is indicative of the presence or absence of an *ability* to perform the duties of a particular job at a *required level of competence*. Thus, logically, there are at least three aspects to a bona fide occupational qualification: (1) a trait; (2) job duties; and (3) a required level of performance. In applying the BFOQ test to determine whether an occupational qualification is "bona fide" for purposes of § 4(f)(1), each of these components must be distinguished.

Where important safety considerations are involved, under the first part of the BFOQ test it is the *duties* of the job involved that must relate to the essence of the employer's business and it is the *required level of performance* that must be reasonable in light of the safety risk. Under the second part of the BFOQ test, the question is whether there is a factual basis for believing either that all or substantially all persons possessing the *trait* would be unable to perform the *duties* of the job involved at the *required performance level* or that it is impossible or impractical to determine, on an individual basis, which persons possessing that *trait* can and cannot perform, at the *required level*, the *duties* of the job in question.

"But whatever the verbal formulation," *Dothard v. Rawlinson*, 433 U.S. at 333, it is clear that in cases involving important safety considerations, the test requires that an employer be accorded flexibility and discretion in selecting job qualifications stringent enough to insure safety. Moreover, where the evidence is conflicting as to whether persons over a certain age can be dealt with on an individual basis, the employer should be allowed to adopt a conservative stance. Once an employer has demonstrated that the duties of the job at issue are related to the "essence of his business" and that the qualifications selected for the job are "reasonable in light of the safety risk," he must then show that he has "reasonable cause to believe, that is, a factual basis for believing," *either* that most of the persons excluded by a challenged age limitation do not possess such job qualifications *or* that individualized determinations are not practical, thereby justifying a "reasonable general rule."

Analyzed in light of these standards, it is clear that the trial court's BFOQ instruction in this case was deficient in at least three critical respects. First, the charge failed even to mention the deference due Western's selection of job qualifications for the position of Second Officer that are reasonable in light of the safety risks. Second, the charge instructed the jury that Western had the burden of proving *in fact* that it is impossible or impractical to determine, on an individual basis, which persons over age 60 do and do not possess the job qualifications Western has determined are necessary for the position of Second Officer. Finally, the instruction totally disregarded the federal mandate that Western conduct its operations with the "highest possible degree of safety."

B. *The Jury Instruction Failed To Accord Western Any Discretion In Selecting Job Qualifications For Essential Flight Personnel That Are Reasonable In Light Of The Safety Risks.*

That interstate air carriers must be allowed flexibility in setting safety standards can hardly be questioned. As the court stated in *Murnane v. American Airlines, Inc.*, 667 F.2d at 98:

> [T]he airline industry is one in which safety is of the utmost importance. The staggering death tolls and resulting human suffering which have followed some of our nation's horrible air disasters attest to this fact. Therefore, in our judgment, the airline industry must be accorded great leeway and discretion in determining the manner in which it may be operated *most safely*, *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 n.30 (5th Cir. 1976). This is in accord with American's view that "safe" is not sufficient. Rather, the "safest" possible air transportation is the ultimate goal. Courts, in our view, do not possess the expertise with which, in a cause presenting safety as the critical element, to supplant their judgments for those of the employer.

Id. at 101 (emphasis in original).

In the exercise of its special expertise in aviation safety, Western has determined, based on sound medical evidence, that the safety of its passengers and employees would be seriously jeopardized by allowing Second Officers to continue flying past age 60. This determination is based primarily on three facts. First, qualified and reliable Second Officers are essential to the safe operation of Western's aircraft. Second, age-related changes in health and performance adversely affect the ability of increasing numbers of individuals to perform as Second Officers with the highest level of safety and, consequently, endanger the safety of Western's inflight operations as a whole.[25] Third, it is not possible to determine through medical examinations, periodic performance reviews or other objective tests, which individuals over age 60 do and do not possess the qualifications determined by Western to be necessary to safe performance of the duties of a Second Officer.

Although plaintiffs attempted to *minimize* the importance of the Second Officer position, it cannot be disputed that Second Officers are necessary to the safe operation of Western's aircraft and must be physically and mentally capable of performing their normal and emergency duties at all times.[26] The Federal Aviation Ad-

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[25] Such age-related changes in health and performance not only include increased risks of sudden incapacitation due to heart attacks, strokes and similar medical events, but also more subtle and difficult to detect changes resulting simply from the aging process alone, such as loss of ability to perform highly skilled tasks rapidly, to resist fatigue, and to perform effectively both physically and mentally in complex and stressful situations. *See* 24 *Fed. Reg.* 9776, 9777 (1959); 49 *Fed. Reg.* 14692, 14695 (1984).

[26] Plaintiffs concede that it would be unsafe to operate an aircraft designed for three-man operation without a qualified Second Officer. Moreover, even plaintiffs' experts conceded that during takeoff and landing operations, as well as in abnormal and emergency situations, the physical and psychological health of the Second Officer is crucial to the safe operation of Western's aircraft (R.T. 790-94).

ministration, an agency possessing exclusive jurisdiction over air safety regulation,[27] requires Western to utilize Second Officers on all of its DC-10 and B-727 aircraft. 14 C.F.R. §§ 121.385(a), 121.387 (1984). The reason for this requirement is elemental—these aircraft were designed by the manufacturer to be flown by a *minimum* of three crew members, with each actively participating in the operation of the aircraft.

The specific duties of a Second Officer include, among other things, pre-flight inspection and monitoring the aircraft's fuel, electrical, hydraulic and other systems during flight. More importantly, Western's operating procedures assume that the Second Officer performs his duties as part of a coordinated team (R.T. 2136-2145). Western employs coordinated crew concepts in which cockpit duties are divided among all three crew members and in which the activities of each crew member are coordinated through the use of checklists and other prescribed procedures.[28] Although only the Captain and First Officer actually manipulate the flight controls, all three crew members actively participate in the operation of the aircraft.[29]

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[27] *See* 49 U.S.C. § 1348(a), (c) (1982); *see also Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638-39 (1973); *Starr v. Federal Aviation Administration*, 589 F.2d 307 (7th Cir. 1979).

[28] R.T. 2096-2098. This is especially true during critical flight phases, such as takeoffs and landings and in emergency situations, when all three crew members are simultaneously performing their assigned duties.

[29] The flight controls are, however, often manipulated by the Captain and First Officer in direct response to information provided by the Second Officer. For example, the proper speed at which to land a large commercial aircraft is the product of calculations which vary from flight to flight depending on the weight of the aircraft, fuel levels, weather conditions and equipment malfunctions. These calculations are within the prescribed duties and expertise of the Second Officer and provide the Captain and First Officer with information critical to the safe landing of the aircraft. Obviously,

Western's operating strategy is to achieve a predictable cockpit routine for normal and abnormal operations through the use of standardized procedures to be followed by each crew member. These procedures are contained in checklists used by the crew to deal with a variety of circumstances, including life threatening emergencies. The goal of Western's strategy is to achieve predictability by requiring adherence to carefully developed and rehearsed flight deck procedures designed to convert even emergency situations into routine and predictable operations. Each crew member is trained not only to perform the specific duties of his position, but also to rely upon and interact with the other crew members (R.T. 2096-2098). Western attempts to equalize duties among its cockpit crew so that no one crew member is overloaded and each is actively involved in the flight operation.[30]

Western believes that its coordinated crew concept achieves an element of stability and predictability necessary to the safety of its operations. It is through strategies such as this that the inherently unforgiving environment in which Western operates has been made routine and safe. For Western's operating system to work effectively, however, each cockpit crew member must perform his prescribed duties as part of a coordinated team.

An incapacitated crew member, whether it be the Captain, First Officer or Second Officer, presents more of a problem than simply an increased workload for the other crew members. The normal routine of the cockpit is interrupted and attention is diverted to the welfare of the disabled crew member (R.T. 2151-2161). Even under normal flight conditions, serious accidents can, and

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errors in these calculations could result, and at least in one instance actually have resulted, in a serious accident (R.T. 2142-2145).

[30] In this regard, FAA regulations prohibit an airline from employing a "crew redundancy" concept which requires "the performance of multiple functions at the same time by one airman." 14 C.F.R. § 121.385(b) (1984).

have occurred, as a result of crew members being diverted from their assigned tasks.[31] Stated simply, a flight with a disabled crew member is no longer routine, predictable or *safe*.[32]

Because of the importance of crew coordination, Western has determined that, to the extent possible, it should seek to reduce the risk that one of its crew members will be incapacitated or otherwise unable to perform his duties. As such, Western has established stringent qualifications for all cockpit positions designed to ensure that its aircraft are manned at all times by the most highly skilled, reliable and fit individuals possible.[33] These qualifications include a requirement that all crew members be physically and mentally capable of performing their duties at all times and that they be free of characteristics associated with an increased risk of subtle or sudden incapacitation. Under the circumstances, it is clear that

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[31] R.T. 2097-2098. Obviously, under emergency conditions, rather than helping to manage the emergency, a disabled crew member would become part of the emergency.

[32] The district court's suggestion that "crew redundancy concepts" adequately address the dangers resulting from a crew member becoming incapacitated during flight is naive at best. In the first place, the FAA's requirement that at least one other flight deck crew member be qualified to provide emergency performance of the Second Officer's duties merely confirms the importance of those duties to the safe operation of the aircraft. More importantly, however, the district court's suggestion totally ignores the fact that inflight safety is achieved largely through adherence to carefully developed and coordinated flight deck routines. Obviously, a Second Officer experiencing a disabling illness, even during normal flight operations, would disrupt the established routine and, thereby, increase the risk of error.

[33] The fact is that Western treats all cockpit crew members as being engaged in the same occupation, that of pilot. Western's pilots have separate training and union membership and all advance along the same line of progression, pursuant to the same seniority system, from Second Officer to First Officer to Captain. *Cf. Mahoney v. Trabucco*, 738 F.2d 35 (1st Cir. 1984).

Western's job qualifications for cockpit crew members, including Second Officers, are reasonably necessary to the essence of its business and reasonable in light of the safety risks.

Plaintiffs' attempts to characterize the Second Officer's duties as *less* important than those of the Captain and First Officer simply miss the point. Although the consequences of a Captain or First Officer becoming disabled during flight might be more severe, that fact neither justifies nor requires Western to ignore the consequences of a Second Officer experiencing a disabling illness in flight. As an interstate air carrier with a public duty to operate with the highest possible degree of safety, Western is in the business of avoiding and managing risks resulting from low probability occurrences which could have extremely serious consequences. Indeed, such risk management is the "essence of [Western's] business, since aircraft accidents and incidents are invariably unique and low probability occurrences." *Harriss v. Pan American World Airways, Inc.*, 437 F.Supp. 413, 434 (N.D. Cal. 1977), *aff'd*, 649 F.2d 670 (9th Cir. 1980).

The plain fact is that in the area of aviation safety there are no absolute answers. Although reasonable persons might differ in assessing the need for a particular job qualification, the airlines are simply better equipped than courts or juries to deal with issues concerning the safety of their passengers. As long as a specific job qualification is reasonable in light of the safety risks, the fact finder should not be permitted to second guess an airline's judgment as to how stringent job qualifications must be to ensure the safe operation of its business.

In this case, the BFOQ instruction given by the trial court, and approved by the Ninth Circuit, accorded absolutely no discretion to Western in selecting job qualifications for Second Officers and in evaluating their reason-

ableness. The jury was not even instructed on the first prong of the BFOQ test and there was no explanation of the significance of the safety factor in assessing whether qualifications selected by Western for Second Officers were "reasonable in light of the safety risk." On the contrary, the jury was encouraged to disregard Western's assessment of the safety risks and to substitute its judgment as to what job qualifications would ensure the safe operation of Western's business.[34]

The implications of the BFOQ instruction approved below are staggering. If the standard embodied in that charge is upheld, the airlines will no longer be entitled to exercise their expertise and discretion in setting qualifications for essential flight personnel designed to insure passenger safety. Rather, juries with no knowledge or expertise in the highly specialized field of aviation safety will become the ultimate arbiters of how the airlines are to be operated most safely. Western submits that such a result is not only contrary to established legal

[34] The instruction's failure to accord any flexibility or discretion to Western in selecting stringent job qualifications for the Second Officer position, under the first part of the BFOQ test, also confused the instruction with respect to the second part of the test. Under the second part of the test, the jury should have been asked to determine whether Western had a factual basis for believing that it was impractical to determine which persons over age 60 do and do not possess the qualifications selected by Western for Second Officers, including the requirement that persons occupying that position be free of characteristics associated with an increased risk of sudden or subtle incapacitation. Under the instruction as given, however, the jury was permitted to make its own independent determination as to whether persons over age 60 can perform the job of Second Officer *safely* and efficiently. Although the jury could very well have found that medical science cannot identify those persons over age 60 that are subject to sudden or subtle incapacitation, there was nothing to prevent the jury from determining at the same time that persons over age 60 can perform the duties of a Second Officer *safely* because the jury disagreed with Western's determination that increased risk of incapacitation precluded *safe* job performance.

principles, but totally disregards important societal interests in achieving the safest air transportation possible.

C. *The Jury Instruction Omitted The "Factual Basis For Believing" Standard For Determining Whether It Is Practical For Western To Distinguish Between Those Who Do And Do Not Possess The Requisite Job Qualifications.*

As previously noted, under the *Tamiami/University of Texas Health Science Center* BFOQ standard, once an employer has shown that the duties of the job in question are related to the essence of its business and that the qualifications selected for the job are reasonable in light of the safety risks, its remaining burden is to demonstrate a "reasonable cause to believe, that is, a factual basis for believing," *either* that most persons excluded by the challenged age limitation do not possess the selected qualifications *or* that it is impossible or impractical to deal with such persons on an individual basis, thereby justifying a "reasonable general rule." *Johnson v. American Airlines, Inc.*, No. 83-1510, at 674 (5th Cir. No. 8, 1984); *Equal Employment Opportunity Commission v. University of Texas Health Science Center*, 710 F.2d at 1093; *accord Tuohy v. Ford Motor Co.*, 675 F.2d at 846; *Hoefelman v. Conservation Commission of Missouri Department of Conservation*, 718 F.2d at 286 (McMillan, J., concurring); Note, *Age Discrimination in Employment Act of 1967*, 90 Harv. L. Rev. 380, 407 (1967). In the present case, however, the trial court's BFOQ charge instructed the jury that Western was required to prove by a *preponderance of the evidence* that individualized determinations were impossible or impractical. This was clear error and requires reversal of the judgment below.

The essential dispute between the parties in this case was whether or not medical diagnostic techniques exist that are capable of accurately predicting the likelihood

of persons over age 60 suffering sudden or subtle incapacitations precluding safe and efficient performance of a Second Officer's duties. Both sides presented qualified expert testimony on this issue.[35] Western's experts testified that reasonably accurate predictions of this sort cannot be made with the medical knowledge presently at hand.[36] Plaintiffs' experts, on the other hand, had more confidence in the medical profession's present capabilities.[37]

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[35] Since the ADEA only covers employees between the ages of 40 and 70, the testimony only focused on allowing Second Officers to work until age 70. However, if age is not a BFOQ for the job of Second Officer because of plaintiffs' opinion of the adequacy of individual testing, some state laws might prohibit Western from enforcing its policy past age 70. *See e.g.*, California Fair Employment and Housing Act, California Government Code Part 2.8, Division 3, Title 2, Section 12920 and 12926(a). In that regard, plaintiffs' expert, Dr. Mohler, has testified that he could predict "with 99% certainty" whether a pilot would have a heart attack within two years after he examined him, and that the psychological and psychomotor abilities of a healthy pilot do not necessarily decline significantly until the pilot reaches the age of 90 or more. *See Hoefelman v. Conservation Comm. of Missouri*, 718 F.2d 281, 283 (8th Cir. 1983) (upholding rejection of Dr. Mohler's testimony). Presumably even Dr. Mohler would find age to be a BFOQ for the pilot position at some age over 90.

[36] Western relied primarily on the testimony of Dr. Douglas E. Busby, a former FAA Deputy Air Surgeon and a specialist in aerospace medicine. Dr. Busby is a Diplomate of the American Board of Preventive Medicine in Aerospace Medicine and a Fellow of the American College of Preventive Medicine. Dr. Busby also possesses a Masters Degree in bio-physics and has conducted extensive research on the effects of the aging process (R.T. 1264-76).

[37] Although plaintiffs' experts disputed the existence of a *cause-effect* relationship between age and deteriorating physical and mental ability, they did not, and could not, dispute that the risks of sudden and subtle incapacitation are *correlated* with increasing age. Thus, while Western's age 60 limitation for Second Officer probably excludes some Second Officers who are capable of performing, it indisputably increases the overall safety of Western's operations. Under these circumstances, and despite the opinion of plaintiffs' experts that Western's policy is not "necessary," *Criswell v. Western Air Lines, Inc.*, 709 F.2d at 551, it is clear that Western's age 60 limitation for Second Officers is reasonably necessary to the safe operation of its business.

In support of its position, Western also relied on the FAA's findings that:

> [T]he evidences of the aging process are so varied in different individuals that it is not possible to determine accurately with respect to any individual whether the presence or absence of any specific defect in itself led to or precluded a sudden incapacitating [heart attack or stroke]. *Any attempt to be selective in predicting which individuals are likely to suffer an incapacitating attack would be futile under the circumstances and would not be medically sound.*
>
> . . . .
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> Other factors, *even less susceptible to precise measurement* as to their effect but which must be considered in connection with safety in flight result simply from aging alone and are, with some variations, *applicable to all individuals.* These relate to loss of ability to perform highly skilled tasks rapidly, to resist fatigue, to maintain physical stamina, to perform effectively in a complex and stressful environment, to apply experience, judgment and reasoning rapidly in new, changing and emergency situations, and to learn new techniques, skills and procedures.

24 *Fed Reg.* 9776, 9777 (1959) (emphasis added). These findings were largely reaffirmed by the FAA on April 12, 1984, following a review of a special report prepared by the National Institute on Aging Panel:

> There can be no real dispute that, with advancing age, the risks of suffering incapacitating medical events and of adverse psychological, emotional and physical changes rise. Although risks of incapacita-

tion are present in younger people, overall they are so low as to be acceptable . . . The conclusions reached by the NIA Panel and the supportive statements contained in the report point to a present inability to distinguish those pilots who, as a consequence of aging, present a threat to air safety from those who do not. Furthermore, public comments, especially those received from two experts from NASA and the Medical Director of a large aerospace firm, agree that there are currently no methods to obtain medical and performance data on older pilots which would provide significantly meaningful data to consider relaxing the age 60 rule. *The inability to detect or predict with precision an individual's risk of sudden or subtle incapacitation, in the face of known age-related risks, counsels against relaxation of the rule.*

49 *Fed. Reg.* 14692, 14695 (April 12, 1984) (emphasis added).[38]

The FAA's findings, coupled with the testimony of Western's medical experts at trial, clearly showed that Western had a factual basis for believing that it is impossible to deal with persons over age 60 on an individualized basis. *See Gathercole v. Global Associates*, 727 F.2d 1485 (9th Cir. 1984). Although Western is aware that plaintiffs' experts hold a different opinion respecting the efficacy of present medical diagnostic techniques to accurately predict the likelihood of persons over age 60 suffering sudden or subtle incapacitations, Western submits that the very existence of such a controversy among medical experts requires a conservative decision by management. In recognition of the duty resting on all air carriers to "perform their services with the highest possible degree of safety," Western is required to adopt a conservative stance regarding fitness standards for all flight personnel. *Harriss v. Pan American World Airways, Inc.*, 437 F.Supp. 413, 435 (N.D. Cal. 1977), *aff'd*, 649 F.2d 670 (9th Cir. 1980); *Condit v. United Air Lines, Inc.*, 13 Fair Empl. Prac. Cas. (BNA) 689 (E.D. Va. 1976), *aff'd*, 558 F.2d 1176 (4th Cir. 1977); *cf. Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859; *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224. Simply stated, by failing to deal with a known risk-causing factor, such as age, Western would be breaching its federal duty to maximize safety. *See Burwell v. Eastern Air Lines, Inc.*, 633 F.2d 361, 373 (4th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981) ("safety practices . . . are not designed to govern a certain disaster. Risk management involves the elimination of potential impediments to safety before they materialize into unfortunate realities").

[38] That the FAA's Age 60 Rule, 14 C.F.R. § 121.383(c) (1984), does not, by its terms, apply to Second Officers has no significance under the second part of the BFOQ test, which is only reached after satisfying the first part of the test. In any event, Western is under a federal duty to institute safety policies in addition to FAA *minimums*. Indeed, the entire thrust of § 601 of the Federal Aviation Act, 49 U.S.C. § 1421 (1982), is that FAA rules and regulations are *minimums* for air carriers and are not designed to supplant but rather to supplement the "duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest." 49 U.S.C. § 1421(b) (1982).

If the only thing at stake in this case had been plaintiffs' interests in being free of arbitrary age discrimination, it might have been appropriate to permit the jury to weigh the medical evidence and decide which side's experts were more convincing. However, more was involved than plaintiffs' desire to pursue a chosen occupation; this case also involved an overriding public interest in safe air transportation. *Cf. Dothard v. Rawlinson*, 433 U.S. at 335-36.

If Western is prohibited from requiring Second Officers to cease flying at age 60, and if it then turns out that Western's experts were right, the results could be catastrophic. Under the BFOQ standard approved by the

Ninth Circuit in this case, this potentiality is not even to be considered. Given the extremely serious consequences of aircraft accidents, it is inconceivable that in balancing an individual's right to be free from employment discrimination against the public interest in safe air transportation, a higher value would not always be placed on the safety of the traveling public. *Murnane v. American Airlines, Inc.*, 482 F.Supp. at 147; *Air Line Pilots Association, International v. Quesada*, 182 F.Supp. at 596. Nevertheless, by requiring Western to prove to a certainty that persons over age 60 cannot be dealt with on an individual basis, the lower courts apparently concluded that the rights of individuals under the ADEA are to be determined in the abstract without regard to the burdens their exercise might impose on others.

D. *The Jury Instruction Failed To Recognize Western's Duty To Conduct Its Operations With The Highest Possible Degree Of Safety.*

The jury should also have been instructed to consider Western's federal duty to maximize safety in deciding whether an age 60 limitation for Second Officers is reasonably necessary to the essence of Western's business.[39] In upholding the district court's refusal to charge the jury regarding Western's duty to maximize safety, the Ninth Circuit suggested that the reference in the BFOQ instruction to "safe transportation" and "safe" job performance "struck a proper balance" between the "obligations of a public carrier to operate safely and the requirement of the ADEA that an employer establish a BFOQ defense as 'reasonably necessary.'" 709 F.2d at 551. Western respectfully submits that this conclusion fundamentally misconceives the nature of its federal safety obligations.

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[39] The district court rejected instructions offered by Western to reflect its statutory duty to maximize safety, with the comment "I do not want to get in to that." R.T. 2376.

As a commercial air carrier, Western is charged both under considerations of public policy and by operation of the Federal Aviation Act with the duty to conduct its operations "with the *highest possible* degree of safety." 49 U.S.C. § 1421(b) (1982) (emphasis added). Stated simply, under this federal mandate "safe" is *not* enough; rather, Western is required to adopt the *safest possible* policy in dealing with known age-related safety risks. *See Murnane v. American Airlines, Inc.*, 667 F.2d at 101.

Although Western's duty to provide the safest possible air transportation was at the very heart of its BFOQ defense, the jury instructions failed even to acknowledge the existence of that duty. By totally disregarding one side of the scale, it is clear that the standard applied by the district court failed to balance properly Western's duty to maximize the safety of its operations against the requirement that it established age as a bona fide occupational qualification for the position of Second Officer.

II. The Trial Court Erred By Instructing The Jury That Western Was Required To Prove By A Preponderance Of The Evidence That Its Challenged Employment Decisions Were Based On Reasonable Factors Other Than Age.

In addition to its erroneous BFOQ instruction, the district court erred by instructing the jury that Western had the burden of proving, by a "preponderance of the evidence," that its refusal to allow plaintiffs Criswell and Starley to downbid to the position of Second Officer was motivated by "reasonable factors other than age." The court of appeals upheld the instruction, stating:

> The "reasonable factors" defense appears alongside the BFOQ exception in the ADEA . . . and is *an*

affirmative defense for which the employer bears the burden of pr...

709 F.2d at 552 (emphasis added).[40]

The court of appeals was correct, of course, in noting that the reasonable factors other than age defense appears alongside the BFOQ defense:

> (f) It shall not be unlawful for an employer . . .
>
> (1) to take any action otherwise prohibited . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;
>
> . . .
>
> (3) to discharge or otherwise discipline an individual for good cause.

[40] None of the three cases relied upon by the court of appeals supports its holding. In *Sutton v. Atlantic Richfield*, 646 F.2d 407 (9th Cir. 1981), the court did not place the burden of proof on the defendant with respect to the reasonable factors defense. The court carefully followed this Court's rulings in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), in holding that the plaintiff "always retains the burden of persuasion . . . ." 646 F.2d at 412.

In *EEOC v. County of Santa Barbara*, 666 F.2d 373 (9th Cir. 1982), the court merely stated that where "it is undisputed that an employee was terminated solely because of age, the burden shifts to the employer to prove that the termination falls within one of the exceptions to the ADEA's prohibitions." *Id.* at 375 n.6. There, the defendant asserted both that age was a bona fide occupational qualification and also that its actions were in compliance with the terms of a bona fide seniority plan.

In *Marshall v. Baltimore & Ohio Railroad*, 461 F.Supp. 362 (D. Md. 1978), *modified*, [illegible] F.2d 1107 (4th Cir. 1980), *cert. denied*, 454 U.S. 825 (1981), the court noted that the reasonable factors defense was "inextricably bound up in the more important question of whether the defendants have shown a 4(f)(2) defense since both depend upon the question of pension entitlement." 461 F. Supp. at 372. Accordingly, the court analyzed the case under the 4(f)(2) defense rather than the reasonable factors defense.

29 U.S.C. § 623(f) (1982). But that observation does not resolve the issue. The BFOQ defense is entirely different in effect and operation from the "reasonable factors" and "good cause" defenses which appear beside it. Under the BFOQ defense, the defendant *admits* the plaintiff's allegation of age discrimination, but attemps to justify the challenged employment decision as based on a BFOQ. Under the reasonable factors and good cause defenses, the defendant *denies* the plaintiff's allegation of age discrimination, and attempts to show that the challenged employment decision was *not* based on age, but rather on reasonable factors other than age or on good cause.

In the case at bar, Western denied that its refusal to allow plaintiffs Criswell and Starley to bid down from Captain to Second Officer was "because of such individual[s'] age," 29 U.S.C. § 623(a) (1982), contending instead that such refusal was "based on reasonable factors other than age." 29 U.S.C. § 623(f)(1) (1982). Specifically, Western based its refusal to allow the downbids on the determination of the Pilots System Board that the Pilot Agreement did not permit such two-step downbids from Captain to Second Officer.

Western's defense (that its treatment of Criswell and Starley was not based on their age, but rather on reasonable factors other than age) was not "an affirmative defense" within the meaning of the common law. Under common law principles, "an affirmative defense should give color to the opposing party's claim, *i.e.*, admit an apparent right in the opposite party and rely on some new matter by which that apparent right is defeated." 2A *Moore's Federal Practice*, ¶ 8.27[3]. Under the common law, "the admission had to be clearly inferable from the affirmative defense." *Id.* Here, Western's assertion that its actions were based on reasonable factors other than age did not create an inference that Western admitted plaintiffs' claims of age discrimination. To the

contrary, Western's reasonable factors other than age evidence was entirely consistent with and in furtherance of its denial of age discrimination. In fact, had Western never raised the reasonable factors defense, the same evidence would have been probative of its denial of plaintiffs' prima facie case of age discrimination.

The error in the charge and the court of appeals' analysis is fundamental. It is clearly improper to place upon the employer the burden to prove that age was *not a determining factor*, when it is the employee's burden at all times to prove that age *was* a determining factor. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253-256 (1981); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1008 (1st Cir. 1979); *Marshall v. Westinghouse Electric Corp.*, 576 F.2d 588 (5th Cir. 1978); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Board of Trustees v. Sweeny*, 439 U.S. 24, 25 (1978).

In *Marshall v. Westinghouse Electric Corp.*, 576 F.2d 588 (5th Cir. 1978), the Fifth Circuit held that once the plaintiff makes out a prima facie case of age discrimination, the defendant bears the burden of *going forward* with evidence to demonstrate reasonable factors other than age for the plaintiff's discharge. The burden of persuasion, however, "never shifts; it remains upon the ADEA plaintiff." *Id.* at 590. In so holding, the court differentiated the BFOQ defense, which is treated as an affirmative defense, from the reasonable factors other than age and the good cause defenses under the Act. The court noted correctly that a defendant who seeks to establish a BFOQ is essentially asserting an affirmative defense "in the nature of confession and avoidance." *Id.* at 591. The court explained as follows:

> An age-related BFOQ permits an employer to admit that he has discriminated on the basis of age, but to avoid any penalty. The establishment of a BFOQ relating to age justifies an employer's violation of the heart of the ADEA, allowing him to apply a general exclusionary rule to otherwise statutorily protected individuals solely on the basis of class membership. The good cause and differentiating factor exceptions, on the other hand, are denials of the plaintiff's prima facie case.

Id. at 591.

In *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979), the trial court had interpreted *McDonnell Douglas* to require the defendants to prove by a preponderance of the evidence that their actions "were motivated by reasonable factors other than age or were for good cause." *Id.* at 1011. The First Circuit reversed, holding that the district court erred by placing too great a burden on the defendants:

> We think it now clear that *McDonnell Douglas* leaves the burden of persuasion at all times on the plaintiff, and that the employer's burden to 'articulate' a legitimate, nondiscriminatory reason is not a burden to persuade the trier that he was in fact motivated by that reason and not by a discriminatory one.

Id. at 1011. *See Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978).

The trial court below compounded its error by instructing the jury that even if Western's employment decisions were based on reasonable factors other than age, those employment decisions might nevertheless violate the Act under a "disparate impact" theory of discrimination (JA 59-61). By requiring the defense of such reasonable factors under a business necessity test, the court effectively eliminated reasonable factors other than age as a separate defense under the Act.[41]

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[41] This Court has held that a violation of Title VII can be established without proof of intentional discrimination, under a disparate impact theory. *Griggs v. Duke Power Company*, 401 U.S. 427

The trial court's charge on the reasonable factors other than age defense placed the burden of proof on Western to show that its employment decisions were based upon reasonable factors other than age, when it was plaintiffs' burden at all times to show that age was the determining factor in those employment decisions. The charge was clearly erroneous and requires reversal of the judgment below.

(1971). The Court in *Griggs* held that an employer's high school education and employment test requirements for hiring violated Title VII, because they adversely affected black applicants and operated to freeze the status quo of prior discrimination against blacks in education and employment. The *Griggs* analysis has not been extended to the ADEA.

As noted by Mr. Justice Rehnquist in *Markham v. Geller*, 451 U.S. 945 (1981) (dissenting from denial of certiorari), this "Court has never held that proof of discriminatory impact can establish a violation of the ADEA . . . ." 451 U.S. at 949. Unlike Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, under which this Court created the disparate impact theory of discrimination, the ADEA explicitly exonerates employment decisions "based on reasonable factors other than age." Necessarily, then, based on the unambiguous language of the statute, where employment decisions are based upon reasonable factors other than age, they are permissible even though they might be shown to have a disparate impact upon older workers. As explained in *EEOC v. Wyoming*, 103 S.Ct. 1054, "in order to ensure that employers were permitted to use *neutral criteria not directly dependant* on age . . . , the Act provided that certain otherwise prohibited employment practices would not be unlawful . . . 'where the differentiation is based on reasonable factors other than age.'" *Id.* at 1058 (emphasis added).

CONCLUSION

For all of the foregoing reasons, the judgment of the court of appeals should be reversed.

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AMICUS CURIAE

BRIEF

No. 83-1545

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WESTERN AIR LINES, INC.,

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v.

CHARLES G. CRISWELL, ALBERT RON and RULON H. STARLEY,

Respondents.

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v.

WESTCOT B. STONE, III, et al.,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

		Page
Table of Authorities		ii
Brief Amicus Curiae		
I.	Introduction	1
A.	Statement of Interest of Amicus Curiae	1
B.	The Purpose of the ADEA Demands a Narrow Interpretation of the Exceptions to the Act	4
II.	Argument	7
A.	The Instructions Given to the Jury Regarding Petitioner's BFOQ Claim Were Proper	7
B.	The Burden of Proof on an RFOA Defense Should be on the Employer	13
III.	Conclusion	15

TABLE OF AUTHORITIES

Cases:	Page
Airline Pilots Association International v. Trans World Airlines, Inc., 713 F.2d 940 (2d Cir. 1983), *cert. granted sub nom.*, 104 S. Ct. 1412 (1984) and *cert. granted sub nom.*, 104 S. Ct. 1706 (1984)	8n
Arritt v. Grisell, 567 F.2d 1267 (4th Cir. 1977)	8n
Criswell v. Western Air Lines, Inc., 709 F.2d 544 (9th Cir. 1983)	7, 7n, 9, 11
Criswell v. Western Air Lines, Inc., 514 F. Supp. 384 (C.D. Cal. 1981)	12, 14
Equal Employment Opportunity Commission v. City of St. Paul, 671 F.2d 1162 (8th Cir. 1982)	11n
Equal Employment Opportunity Commission v. University of Texas Health Science Center, 710 F.2d 1091 (5th Cir. 1983)	10n
Equal Employment Opportunity Commission v. Wyoming, 460 U.S. 226 (1983)	13n
Harriss v. Pan American World Airways, Inc., 649 F.2d 670 (9th Cir. 1980)	8n
Hoefelman v. Conservation Commission of Missouri Department of Conservation, 718 F.2d 281 (8th Cir. 1983)	8n, 10n
Mahoney v. Trabucco, 738 F.2d 35 (1st Cir.), *cert. denied*, 53 U.S.L.W. 3403 (1984)	8n
Orzel v. City of Wauwatosa Fire Department, 697 F.2d 743 (7th Cir.), *cert. denied*, 104 S.Ct. 484 (1983)	6, 8, 8n, 10n
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Stewart v. Smith, 673 F.2d 485 (D.C. Cir. 1982)	8n

Cases:	Page
Tuohy v. Ford Motor Co., 675 F.2d 842 (6th Cir. 1982)	8n, 10n
Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976)	8, 11n, 13
Statutes and Regulations:	
Age Discrimination in Employment Act of 1967, 29 U.S.C. §§621-634 (1982)	passim
29 U.S.C. §621(a)(2) (1982)	4
29 U.S.C. §621(b) (1982)	4
29 U.S.C. §623(f) (1) (1982)	4, 6n
29 C.F.R. 860.102(b) (1981)	7n
29 C.F.R. 1625.6 (1981)	7n
Other Authorities:	
113 Cong. Rec. H34744 (1967)	5n
AARP Statement on Amending the Age Discrimination in Employment Act Before the Subcommittee on Employment Opportunities of the House Education and Labor Committee, 98th Congress, 2d Session (May 17, 1984)	3n
AARP Statement in Support of the Prohibition of Mandatory Retirement and Employment Rights Act of 1982, S. 2617, Before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources, 97th Congress, 2d Session (August 18, 1982)	3n
Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcommittee on Labor and Public Welfare, 90th Congress, 1st Session 28 (1967)	4n
Comment, *The Cost of Growing Old: Business Necessity and the Age Discrimination in Employment Act*, 88 Yale L.J. 565 (1979)	5n

Page

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BRIEF AMICUS CURIAE OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF RESPONDENTS

I. INTRODUCTION

A. *Statement of Interest of Amicus Curiae*

The American Association of Retired Persons ("AARP"), of 1909 K Street, N.W., Washington, D.C. 20049, is a not-for-profit membership corporation of more than 17 million persons

over the age of 50. AARP is the largest organized group of older Americans in the country. In representing the interests of its members, AARP seeks to : (a) enhance the quality of life for older persons; (b) promote independence, dignity and purpose for older persons; (c) lead in determining the role and place of older persons in society; (d) sponsor research on physical, psychological, social, economic and other aspects of aging; and (e) represent the point of view of older persons as members of the workforce.

In keeping with its purposes, AARP has devoted itself to investigating and working to alleviate problems resulting from age discrimination, in employment as well as other aspects of life.[1] Many Americans are victims of discriminatory treatment because of age. Such discrimination has been most prominent in the workplace.[2] Not only is this phenomenon unfair to the individual worker, but it robs the nation of valuable human resources. It is for these reasons that AARP sought and received the consent of the parties to the submission of this brief *amicus curiae*. *See* Exhibits 1 and 2.

While aging is a universal process, it is also a uniquely individual phenomenon. The physiological changes accompanying aging affect different individuals in different ways and at

[1] AARP has recently launched a major campaign to improve the opportunities available to older workers. The "Older Worker Advocacy Initiative" has as its five goals to: (a) assess the impact of an aging work force on society; (b) eliminate age discrimination in the work force through legislative, administrative and judicial action; (c) eliminate stereotypes of older workers; (d) assist employers in creating workplace opportunities for older workers; and (e) help older persons make informed employment and retirement decisions.

[2] The number of suits brought under the Age Discrimination in Employment Act has increased dramatically as awareness of the Act has grown. For example, 9,479 age discrimination charges were filed with the Equal Employment Opportunity Commission ("EEOC") in 1981, a 76 percent increase over the number of charges filed in 1979. In 1983, 14,865 cases were filed with the EEOC.

varying times in their lives.[3] In recognition of this fact and largely as a result of the efforts of AARP, American society has begun to reevaluate its long-held assumptions about the capabilities of older persons, both in and out of the workforce. Just as it has been recognized that an individual's race or sex provides no basis for judging ability, it is becoming increasingly accepted that an individual's chronological age is not an accurate predictor of his or her ability to perform in the workplace.

In the area of age discrimination, AARP's overriding goal has been the eradication of discrimination based on stereotypes regarding the competence of older persons. AARP has been in the forefront of efforts to eliminate age discrimination in employment, and has long advocated the elimination of mandatory retirement.[4]

AARP strongly supported the enactment of the Age Discrimination in Employment Act ("ADEA" or the "Act"), 29 U.S.C. §§621-634 (1982), as a means of promoting the employment of older workers and of prohibiting discrimination based on arbitrary age limits. AARP strongly adheres to the basic premise of the Act: that a person's fitness for a job should be based upon the qualifications of that individual, and that competent individuals who choose to continue working should, by law, be permitted to do so.

[3] *See*, H.L. Sheppard & R.E. Rix, *The Graying of Working America: The Coming Crisis of Retirement-Age Policy* (1977), pp. 51-55. (Older individuals may help maintain their health status through physical exercise.); K. Goldman, *Decline in Organ Function with Age*, Clinical Geriatrics (I. Rossman Ed. 1981), pp. 19-48. (Various systems in body age at different rates.)

[4] *See, e.g.*, AARP Statement on Amending the Age Discrimination in Employment Act Before the Subcomm. on Employment Opportunities of the House Education and Labor Comm., 98th Cong. 2d Sess. (May 17, 1984); AARP Statement in Support of the Prohibition of Mandatory Retirement and Employment Rights Act of 1982, S.2617, Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources, 97th Cong. 2d Sess. (August 18, 1982).

In the instant case, this Court will decide how exceptions to the ADEA will be interpreted. These exceptions are: (1) the bona fide occupational qualification ("BFOQ"); and (2) reasonable factors other than age ("RFOA"). 29 U.S.C. §623(f) (1) (1982). A decision in Petitioner's favor will substantially enlarge the reach of these exceptions, and limit the Act's protection against arbitrary age discrimination. Instead, this Court should adhere to narrow interpretations of these exceptions which are consistent with, and promote, the purpose of the Act.

B. *The Purpose of the ADEA Demands a Narrow Interpretation of the Exceptions to the Act.*

The ADEA was enacted after a finding by Congress that "the setting of arbitrary age limits regardless of potential for job performance has become a common practice; . . ." 29 U.S.C. §621(a)(2)(1982). The express Congressional purpose in enacting the legislation was therefore twofold: (i) "to promote employment of older persons based on their ability rather than age," and (ii) "to prohibit arbitrary age discrimination in employment." 29 U.S.C. §621(b)(1982).

The legislative history of the Act makes clear that the broad remedial purpose of the Act is to eliminate age-based stereotypes in favor of individualized employment decisions based on a person's ability and capability.[5] The Secretary of Labor stated "that

[5] *See, Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcomm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 28 (1967) (statement of Sen. Jacob Javits). ("We must break down the wholly irrational barriers to employment based on age alone which have been permitted to hinder the older worker in a search for employment opportunity. This present age has been called an age where the cult of youth seems to prevail over everything else. . . . [I]t will be our job to introduce a note of realism in that situation which will emphasize the ability and capability of the worker to do the job, rather than his age level, as the desirable criterion for American employment practices.")

age is hardly relevant," to one's ability and capacity to perform in the workplace.[6]

There is a substantial body of medical evidence that supports the findings that led to enactment of the ADEA. The findings, embodied in the landmark Department of Labor Report,[7] and echoed by the American Medical Association,[8] clearly put to rest the erroneous assumption that chronological age is an appropriate indicator of fitness.

Available medical evidence continually reinforces the argument that mandatory retirement ignores the sharply differing capabilities of individual workers at all age levels.[9] The general assumptions about ability to perform based on age are wrong; older workers perform as well, if not better, than younger workers.[10] Reliance on incorrect assumptions about age is thus

[6] *Id.* at 52. (statement of Secretary of Labor Wirtz). ("I am wondering whether we should strike any reference to age at all in any connection and look at employment only in terms of whether the individual does have or does not have the capacity to do whatever job it is that that individual *is* seeking. I think we are close to the ideal point when we eliminate any reference to age at all.")

[7] Report of the Secretary of Labor, *The Older American Worker: Age Discrimination in Employment*, (1965).

[8] 113 Cong. Rec. H34744 (1967) (remarks of Rep. Perkins). ("As the American Medical Association's Committee on Aging has so succinctly put it: 'There is no action more important in the new era of aging, from the standpoint of social, economic and health needs, than the elimination of job discrimination based on chronological age.' ")

[9] *See*, Comment, *The Cost of Growing Old: Business Necessity and the Age Discrimination in Employment Act*, 88 Yale L.J. 565, 576-77 & nn. 50-56 (1979). (Citing authorities supporting conclusion that chronological age is an unsatisfactory predictor of performance.)

[10] McFarland, *The Need for Functional Age Measurements in Industrial Gerontology*, Industrial Gerontology 1 (Fall 1973). (Older workers not only perform (continued on next page)

not only unfair to the individual but medically unfounded.[11]

Given the tendency toward fallacious age-based assumptions, and bearing in mind the Act's premise, any exception to the Act must be interpreted to advance rather than frustrate its purpose. While the ADEA does provide for defenses[12] to the charge of age discrimination, "overuse of [an] exception involves the risk of reintroducing on a broad scale the very age stereotyping the ADEA was designed to prevent." *Orzel v. Wauwatosa Fire Department*, 697 F.2d 743, 748 (7th Cir.), *cert. denied*, 104 S. Ct. 484 (1983).

In particular, the exception for a "bona fide occupational qualification [BFOQ]," which petitioner would have this Court interpret broadly, should not be construed to enable employers to rely on unproven and unsupportable notions of declining ability with advanced age. Such an interpretation would undermine the essence of the ADEA's prohibition: stereotypes must not govern the employment of older persons.

Both the Department of Labor, which originally had jurisdiction over ADEA enforcement, and the Equal Employment Opportunity Commission, which inherited enforcement power in 1979, consistently have applied a very narrow reading of both

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industrial tasks as well as younger workers, but have higher job stability, fewer accidents, and lower absentee rates.); Schwab & Heneman, *Effects of Age and Experience on Productivity*, 4 Industrial Gerontology 113 (1977). (Productivity found to increase with age in a study of older and younger production workers with a standard piece-rate pay system.)

[11] *See*, Drucker & Moore, *Mandatory Retirement: Past, Present and Future of an Anachronism*, 5 W. St. U.L. Rev. 1, 4-7 (1977). (Reviews medical evidence supporting position against the use of a fixed retirement age.)

[12] 29 U.S.C. §623(f) (1982) states, in part:

"It shall not be unlawful for an employer, employment agency, or labor organization –

"(1) to take any action prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age."

the BFOQ and RFOA defenses.[13] This narrow reading properly places the burden on the employer to prove the essential elements of an alleged BFOQ or RFOA. This Court should not allow the burden to be shifted and the stereotype of advanced age as automatic disability to be revived.

II. ARGUMENT

Not wishing to burden this Court with repetitive, exhaustive legal arguments which have undoubtedly been set forth by Respondents, we respectfully highlight below several points of direct concern to AARP.

A. *The Instructions Given to the Jury Regarding Petitioner's BFOQ Claim Were Proper.*

Petitioner argues that the district court's instruction to the jury regarding the BFOQ defense was improper in several respects.[14] In particular, Petitioner argues that the jury should have been instructed that Petitioner could establish the BFOQ defense merely by showing a factual basis for its discriminatory policy.[15] However, as stated by the Ninth Circuit below, "it is clear that the Criswell jury instruction tracks both the language and the spirit of the circuit law on this matter." *Criswell v. Western Air Lines, Inc.*, 709 F.2d 544, 550 (9th Cir. 1983), *cert. denied sub nom.*, 105 S. Ct. 233 (1984) and *cert granted*, 105 S. Ct. 80 (1984).

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[13] In 1968, the year following enactment of the ADEA, the Department of Labor issued an Interpretive Bulletin to assist employers in complying with the ADEA. The Bulletin stated that the "concept of a bona fide occupation will have limited scope and application," and that "the burden of proof in establishing that [the BFOQ exception] applies is the responsibility of the employer...[who] relies on it." 29 C.F.R. 860.12(b) (1981) (superseded September 21, 1981). These statements were adopted in similar form in the final ADEA Interpretive Regulations issued by the EEOC on September 21, 1981: "It is anticipated that this concept of a bona fide occupational qualification will have limited scope and application. Further, as this is an exception to the Act, it must be narrowly construed." 29 C.F.R. 1625.6 (1981).

[14] The challenged instruction is set forth in the opinion of the Ninth Circuit. *Criswell*, 709 F.2d at 549.

[15] *See*, Petitioner's Brief in Support of the Petition for Writ of Certiorari ("Pet. Br.") at 29. "[W]here the evidence is conflicting. . . the employer should be

(continued on next page)

The district court based its instruction on the two-prong test for evaluating BFOQ claims formulated in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976).[16] Under that test, an employer may rely on a BFOQ exception only if it can establish by a preponderance of the evidence: (i) that the job qualifications invoked by an employer to justify discrimination are reasonably necessary to the essence of its business; and (ii) either that all or substantially all persons excluded by the challenged age limitation cannot perform up to the required standard, or that it is impossible or impracticable to deal with all members of the excluded class on an individualized basis.

It is beyond dispute that an employer has the burden of establishing a BFOQ defense. *Orzel, supra.*[17] Petitioner, having failed to meet its burden now argues that the *Tamiami* test as explained in the instruction to the jury was improper, and

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allowed to adopt a conservative stance."; Pet. Br. at 35. "[T]he fact finder should not be permitted to second guess an airline's judgment. . . ."

[16] The standards formulated in *Tamiami* have been adopted by every circuit that has considered the scope of the BFOQ exception. *See, Mahoney v. Trabucco*, 738 F.2d 35 (1st Cir.), *cert. denied*, 53 U.S.L.W. 3403 (1984); *Air Line Pilots Ass'n , Int'l v. Trans World Airlines, Inc.*, 713 F.2d 940 (2d Cir. 1983), *cert. granted sub nom*, 104 S. Ct. 1412 (1984); *Arritt v. Grisell*, 567 F.2d 1267 (4th Cir. 1977); *Tuohy v. Ford Motor Co.*, 675 F.2d 842 (6th Cir. 1982); *Orzel, supra*; *Hoefelman v. Conservation Comm'n of Missouri Dep't of Conservation*, 718 F.2d 281 (8th Cir. 1983); *Harriss v. Pan American World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980); *Stewart v. Smith*, 673 F.2d 485 (D.C. Cir. 1982).

[17] In *Orzel*, the court rejected the argument that a state imposed mandatory retirement age for a particular occupation would constitute a presumption that a BFOQ was established. The court stated that:

> application of a statutory presumption of validity to a state mandatory retirement scheme would effectively shift to the employee challenging that scheme the burden of refuting his employer's BFOQ defense. [citation omitted] Such burden shifting, however, contravenes the settled law of both this and other circuits that it is the employer - not the employee - who has the burden of establishing a BFOQ defense.

Id. at 731.

that, instead, the jury should have been instructed that in light of the substantial discretion afforded employers where issues of safety are present, it need only show a factual basis for its discriminatory policy.[18]

> "In short, where lives of third parties hang in the balance. . . the ADEA should require no more of an employer than that he have a factual basis for believing that individualized evaluations are impractical."

Pet. Br. at 28. Petitioner's argument fails for at least four reasons.

First, what Petitioner seeks, in essence, is an exception that would swallow the rule, and which would enable the employer to successfully assert the BFOQ defense whenever safety is at issue, merely by showing some minimal evidence which it believes justifies its discriminatory policy. However, this formulation virtually ignores the requirement that in evaluating a BFOQ defense a court must strike a *proper* balance between the "obligations of a public carrier to operate safely, and the requirement of the ADEA that an employer establish a BFOQ defense as 'reasonably necessary.' " *Criswell*, 709 F.2d at 551.

Petitioner's rule would allow discriminatory age-related policies in virtually every instance where safety is a factor, thereby eliminating an objective balance between safety and the policies underlying the ADEA. Such an interpretation would permit employers, despite the fact that they are unable to provide sufficient factual evidence justifying a discriminatory age limitation, to decide for themselves whether discriminatory practices are justified. Such a result would provide the perfect opportunity for application of the stereotypical assumption of

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[18] Petitioner's contention that the jury instruction failed to afford sufficient deference to Petitioner's discretion, Pet. Br., 30-37, is nothing more than a restatement of its argument that an employer should be allowed to satisfy the *Tamiami* test merely by showing a reasonable basis for its *belief* that the discriminatory policy is justified. As shown at pages 9-12, infra, however, that argument is unsupportable.

age disability, the eradication of which underlies the Act and which is of primary importance to the members of AARP.[19]

Second, the jury did nothing more than fulfill its proper role as trier of fact.[20] Petitioner has mischaracterized the standard applied by the lower court in an attempt to make it appear that it was unjustly required to meet a much more difficult burden. Thus, Petitioner states that it was required "to prove medical science to a certainty," Pet. Br. at 12, and that "Western had the burden of proving *in fact* that it is impossible or impractical to determine, on an individual basis, which persons over age 60 do and do not possess the qualifications Western has determined are necessary for the safe and efficient operation of the duties of Second Officer." (emphasis in original) Pet. Br. at 13.

However, Petitioner's formulations of its burden in the district court are patently incorrect. The appropriate burden, and the burden that was properly given to the jury, merely requires an employer to show, by a preponderance of the evidence, that "it is impossible or impractical to deal with [excluded persons] on an individualized basis."[21] Nothing need be proven "to a certainty" or "in fact." Petitioner's argument is a poor attempt

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[19] *See*, nn. 5 and 6, *supra*, and accompanying text.

[20] *See*, *Tuohy*, *supra*. "The court must weigh Ford's evidence [that medical science cannot predict, on an individualized basis, the likelihood that a pilot who has reached age 60 will become incapacitated during flight] against that of Tuohy who asserts that medical science has the means of measuring physiological and psychological health independent of age, and that there is no factual basis for believing that all pilots age 60 and over are unable to perform their duties safely." *Id.* at 846. *See also*, *Hoefelman*, *supra*. It is the province of the district court to weigh and evaluate "the directly contradictory expert testimony" and make its finding of facts. *Id.* at 285.

[21] *See*, *Orzel*, *supra*. The presence of a safety issue "does not relieve an employer from the burden of justifying the particular age limitation adopted." (emphasis in original) *Id.* at 735.; *EEOC* v. *Univ. of Texas Health Science Center*, 710 F.2d 1091 (5th Cir. 1983) "The burden of proof is on the employer to (continued on following page)

to eliminate the fact finder's role in evaluating conflicting evidence relating to the BFOQ defense, and to obfuscate the fact that it could not meet its burden.

Third, the *Tamiami* test does allow for sufficient consideration of safety factors, which consideration was properly included in the instruction to the jury.[22] The jury did not, as Petitioner asserts, "substitute its judgment as to what job qualifications would ensure the safe operation of Western's business," Pet. Br. at 36, or "promulgate flight safety rules for the air transportation industry." Pet. Br. at 12. The Ninth Circuit held that:

> [t]he district court struck a proper balance here [between the obligations of a public carrier to operate safely, and the requirements of the ADEA] by describing as the essence of Western's business "the safe transportation" of passengers and by reiterating within the same instruction that it was necessary that second officers over the age of sixty "perform their jobs safely" and that their job performance be "safe and efficient." (emphasis added)

Criswell, 709 F.2d at 551. Thus, the jury properly weighed the evidence, including specifically the safety factors involved, and determined that Petitioner had not established the BFOQ

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establish the BFOQ defense." *Id.* at 1093.; *Smallwood* v. *United Air Lines, Inc.*, 661 F.2d 303 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982) and *cert. denied*, 105 S. Ct. 120 (1984). "To justify a refusal to hire under the BFOQ exception . . . the burden is on the employer to meet a two-prong test." *Id.* at 307. The employer's defense was properly rejected as it "failed to show the impossibility or impracticality of dealing with applicants individually." *Id.* at 309.; *EEOC* v. *St. Paul*, 671 F.2d 1162 (8th Cir. 1982). "[T]he employer has the burden of proving the BFOQ exemption applies." *Id.* at 1167.

[22] *See Usery*, *supra*. The court determined that the BFOQ test need not be modified when the safety factor is present, stating, "we believe that this safety factor is already appropriately highlighted within the current framework of the" BFOQ test. *Id.* at 235.

established the BFOQ defense. *Criswell v. Western Air Lines, Inc.*, 514 F. Supp. 384, 389 (C.D. Cal. 1981).

Finally, notwithstanding Petitioner's contention, medical diagnostic techniques can accurately predict the likelihood of persons over age 60 suffering sudden or subtle incapacitations precluding safe and efficient performance of one's duties. Evidence produced at trial was conclusive that "both the FAA and the airlines have been able to deal with the health problems of pilots on an individualized basis." *Criswell*, 514 F. Supp. at 390. *See also*, *Smallwood*, *supra*, at 308-309. Thus, it is not impossible or impractical to evaluate age-related changes in health, ability and performance on an individual basis."[22]

Petitioner seeks a ruling which would enable the employer to rely on a BFOQ defense without meeting the established standards in cases where safety is a concern and without showing sufficient factual evidence to justify the discriminatory policy. If Petitioner is successful, employers will be free to discriminate on the basis of age whenever the question of safety is raised, merely by showing a "reasonable basis" for an age-based discriminatory policy.[23]

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[22] Furthermore, Petitioner's reliance on Federal Aviation Administration ("FAA") regulations relating to medical and performance data of pilots is improper. The FAA regulations are based on the mental and physical conditions of pilots, not flight engineers. *See also*, n. 24, *infra*.

[23] It should be noted that Petitioner has attempted to obscure the issues by insinuating that a failure to reverse the lower court decision will lead to air disasters: "lives . . . hang in the balance," Pet. Br. at 28; "implications of . . . instruction approved below are staggering," Pet. Br. at 36; "results could be catastrophic," Pet. Br. at 41. However, Petitioner's own policies belie its contention that in the interest of safety it requires the same stringent qualifications for all cockpit positions. Pet. Br. at 34. Petitioner permits pilots under age 60 who can no longer qualify as pilots for medical reasons (cannot hold an FAA first class medical certificate) to continue in the cockpit as flight engineers. *See*, *Criswell*, 514 F. Supp. at 392. Moreover, Petitioner ignores the obvious implication of the FAA's refusal to extend its mandatory age 60 retirement rule to flight engineers. Scare tactics do a disservice to Petitioner and to the Court and do nothing to advance Petitioner's position.

Older individuals have the right to equal treatment in all areas of employment, including jobs that have an impact on the safety of others. The Ninth Circuit's holding does not, as Petitioner insists, eliminate an employer's discretion to establish safety standards for the operation of its business. Pet. Br. at 36. Employers remain free to establish qualifications for jobs which are as stringent as they believe necessary to conduct their business properly. However, when such a qualification is based on an arbitrary age ceiling, that employer must be able to prove by a preponderance of the evidence that indeed "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." *Usery*, *supra*, at 231.[25]

What is at stake is the congressionally mandated requirement that persons of all ages be judged on their ability to perform a given job, and the judicially mandated requirement that an employer who seeks to implement an age-based discriminatory policy must introduce sufficient evidence to show that said policy is in fact justified. To hold otherwise would remove the impediments to discrimination embodied in the ADEA and would mean the mere rubber-stamping of discriminatory practices.

B. *The Burden of Proof on an RFOA Defense Should Be on the Employer.*

Petitioner's suggested interpretation of the standard needed to sustain an RFOA defense constitutes another effort to weaken the protections against age-based discrimination found in the

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[25] *See also*, *EEOC v. Wyoming*, 460 U.S. 226 (1983). "Under the ADEA, however, the State may still, at the very least, assess the fitness of its game wardens and dismiss those wardens whom it reasonably finds to be unfit. Put another way, the Act requires the State to achieve its goals in a more individualized and careful manner than would otherwise be the case, but it does not require the State to abandon those goals, or to abandon the public policy decisions underlying them . . . appellees remain free under the ADEA to continue to do *precisely what they are doing now*, if they can demonstrate that age is a 'bona fide occupational qualification' for the job of game warden." *Id.* at 239-240.

ADEA. Again, Petitioner seeks to lessen an employer's burden of showing that discriminatory actions are permitted under an exception to the ADEA, this time the RFOA exception.

Petitioner seeks a requirement that plaintiffs alleging violations of the ADEA, having already shown the existence of a clearly discriminatory policy, carry the additional burden of proving the absence of reasonable factors other than age. This standard would be extremely detrimental to older workers, since, if Petitioner succeeds, employers could easily articulate "other factors" without being obligated to prove them.

In the present case, Petitioner's policy was to require all flight deck personnel to retire upon reaching age 60. The district court found that plaintiff's (Criswell's) bid for a flight engineer position was rejected "solely because he was approaching age 60 and because Western had a policy which required all flight deck personnel to retire at age 60." *Criswell*, 514 F. Supp. at 388.[26] Given a finding of age discrimination, there is no legitimate reason to force an employee to disprove claims by the employer that the discrimination was motivated by factors other than age.

Where age discrimination has been shown, the RFOA defense must constitute more than a mere denial of such discrimination. Were an employer deemed to have met its burden at trial merely by "going forward with evidence to demonstrate reasonable factors other than age," Pet. Br. at 46, employers could discriminate against older workers practically at will.

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[26] The court also found that "[t]he only circumstances in which Western has consistently denied downbids is by captains nearing age 60." *Criswell*, 514 F. Supp. at 392.

III. CONCLUSION

AARP, with its 17 million members over the age of 50, has a special interest and concern in the elimination of age-based discrimination in employment. Broadly construed exceptions to the ADEA will result in unjustified discrimination against older Americans in the workplace, and should not be afforded judicial sanction.

WHEREFORE, AARP respectfully requests that the decision of the U.S. Court of Appeals for the Ninth Circuit be affirmed.

Respectfully submitted,

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Of Counsel:
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Dated: December 15, 1984
New York, New York

APPENDIX

Exhibit 1

Letterhead of
Kilpatrick & Cody
Suite 3100
100 Peachtree Street
Atlanta, Georgia 30043

November 12, 1984

Steven Zaleznick, Esq.
American Association of Retired Persons
1909 K Street, N.W.
Washington, D.C. 20049

Re: Western Air Lines, Inc. v.
Charles G. Criswell, et al.
Supreme Court of the United States
No. 83-1545

Dear Mr. Zaleznick:

Western Air Lines, Inc. hereby consents to the filing of a brief *amicus curiae* by the American Association of Retired Persons in support of the Respondents.

Cordially,

/s/

Gordon Dean Booth

GDB/eda

cc: Raymond C. Fay, Esq.
Wm. John Kennedy, Esq.

Exhibit 2

Letterhead of
Haley, Bader & Potts
Suite 1600
11 South LaSalle Street
Chicago, Illinois 60603

November 12, 1984

Steven Zaleznick, Esq.
AMERICAN ASSOCIATION OF RETIRED PERSONS
1909 K Street, N.W.
Washington, D.C. 20049

Dear Mr. Zaleznick:

Pursuant to the agreement of counsel, respondents Charles G. Criswell *et. al.*, consent to your filing an *amicus* brief on behalf of the American Association of Retired Persons in *Western Air Lines, Inc. v. Criswell*.

Sincerely,

/s/

Raymond C. Fay

/mtc

cc: Dean Booth, Esq.
Wm. John Kennedy, Esq.

AMICUS CURIAE

BRIEF

No. 83-1545

Supreme Court, U.S.
FILED
DEC 18 1984
JOSEPH L. STEVAS
CLERK

IN THE

Supreme Court of the United States

October Term, 1984

WESTERN AIR LINES, INC.,

Petitioner,

v.

CHARLES G. CRISWELL, ALBERT RON and RULON H. STARLEY,

Respondents.

WESTERN AIR LINES, INC.,

Petitioner,

v.

WESTCOT B. STONE, III, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE OF FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, AMERICAN AIRLINES CHAPTER, AFL-CIO

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TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE.....2

SUMMARY OF ARGUMENT.....4

ARGUMENT.....11

A. THE STANDARD OF PROOF IMPOSED BY THE DISTRICT COURT FOR ESTABLISHING A BFOQ WAS PROPER.....13A

B. THE ROLE OF THE FEDERAL AVIATION ADMINISTRATION.....30

CONCLUSION.....43

TABLE OF AUTHORITIES

Page(s)

Cases

Air Line Pilot Association v. Trans World Airlines, Inc., 713 F. 2d 940 (2d Cir. 1983) cert. granted sub nom. Trans World Airlines, Inc. v. Thurston, 104 S. Ct. 1412 (1984).....32

Borden Farm Products, Inc. v. Baldwin, 293 U.S. 194 (1934).....37

Criswell, et al. v. Western Airlines, Inc., 514 F. Supp. 384 (C.D. Cal. 1981).....5,6,11,12 24,25,27 30,31,42

Diaz v. Pan American World Airways, 442 F.2d 385 (5th Cir. 1971) cert. denied, 435 U.S. 934 (1978).....15

Dothard v. Rawlinson, 433 U.S. 321 (1977).....7,20,21 22,29

Equal Employment Opportunity Commission v. City of St. Paul, 671 F.2d 1162 (8th Cir. 1982).....20

Equal Employment Opportunity Commission v. University of Texas Health Science Center, 710 F.2d 1091 (5th Cir. 1983)....20,29

Monroe v. United Air Lines, Inc., 736 F.2d 394 (7th Cir. 1984).....29,32

Murnane v. American Airlines, Inc., 677 F.2d 98 (DC Cir. 1981).....19

Smallwood v. United Airlines, Inc., 661 F.2d 303 (4th Cir. 1981), cert. denied, 456 U.S. 1007 (1982).....20

Tuohy v. Ford Motor Co., 675 F.2d 842 (6th Cir. 1982).....20

United States v. Western Pacific Railroad Co., 352 U.S. 59 (1956).....9,10,34,39,42

Usery v. Tamiami Travel Inc., 531 F.2d 224 (5th Cir. 1976).....14,15,16,17,18 19,20,21,35-39

Weeks v. Southwestern Bell Telephone & Telegraph Co., 408 F.2d 228 (5th Cir. 1969).....15,16,17,18,19 20,21,22

Statutes

Age Discrimination in Employment
Act of 1967, as amended, 29 U.S.C.
§ 621 et seq. 26

Federal Aviation Act, 49 U.S.C
§ 1421(b) (1982).....3,7,10,28,40

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RULON H. STARLEY.

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v.

WESTCOT B. STONE, III, et al.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF AMICUS CURIAE

FLIGHT ENGINEERS ASSOCIATION
AMERICAN AIRLINES CHAPTER, AFL-CIO
IN SUPPORT OF RESPONDENTS

THE NATURE OF FEIA'S INTEREST

Flight Engineers International Association, American Airlines Chapter, AFL-CIO, ("FEIA") is the collective bargaining representative of the career flight engineers who work for American Airlines, Inc. ("American"). The normal retirement date for these flight engineers, pursuant to a collectively bargained retirement plan, is age 65. This has been so since before 1958. As a result, American's flight engineers have a long and continuing history of performing as flight engineers past the age of 60. Indeed, as of October, 1980, sixty-nine flight engineers over the age of 60 were employed by American (Plaintiff's Exhibit 41).

During the many years that over 60 flight engineers have continued to work on American aircraft there never has been an accident, or near accident, or any kind of unsafe incident, involving one of them. Nor has American, or the Federal Aviation Administration ("FAA") ever seen fit even to raise the possibility that American's statutory obligation to fly "with the highest possible degree of safety," 49 U.S.C. § 1421(b) was or is being prejudiced by the fact that many of its flight engineers are over age 60.

By this case, Western Airlines, Inc. ("Western") seeks to establish that all over 60 flight engineers -- both now, in the past, and in the future -- lack a "bona fide occupational qualification" ("BFOQ").

The impact of such a holding on all of American's flight engineers -- both those already over 60, and those who must work until age 65 to reach "normal retirement date" -- should be obvious: despite its own experience and belief to the contrary, and despite the FAA's position to the contrary, a court holding that an under age 60 requirement for flight engineers is bona fide because safety linked will exert substantial pressure on American to curtail the post age 60 employment of its flight engineers.

SUMMARY OF ARGUMENT

We address below only those issues related to the question of whether under age 60 is a BFOQ for flight engineers.

The District Court below instructed the jury that so as to establish its BFOQ defense, Western needed to prove, by a preponderance of the evidence:

> (1) that in 1978 when these plaintiffs were retired, it was highly impractical for Western to deal with each Second Officer over age 60 on an individualized basis to determine his particular ability to perform his job safely, and
> (2) that some Second Officers (flight engineers) over age 60 possess traits of physiological, psychological, or other nature which preclude safe and efficient job performance that cannot be ascertained by means other than knowing their age.

The burden of proof with regard to this test, imposed by the District Court, approved by the Court of Appeals for the Ninth Circuit, is and should be the bur-

den required to establish a safety related BFOQ defense in an age discrimination case. It conforms with the law as set forth by the leading cases in other circuits. Moreover, the contrary stand urged by Western, i.e., that it need only show an "rational basis" for believing that it satisfied the test set forth by the District Court, transform the BFOQ defense in any safety related industry into little more than a good faith defense: Western's burden would be satisfied, as Western itself argues, by no more than adducing the testimony of a "qualified expert" supporting its view. Given the ability of an employer in a safety-sensitive field to procure such expert testimony, it would lack a "rational basis" for its belief only if a

plaintiff employee could show that the employer's expert either was not "qualified," or would not be trusted by a rational man. Such a test would plainly violate this court's injunction that the BFOQ defense remain "...only the narrowest of exceptions to the general rule requiring equality of employment opportunities,"

Dothard v. Rawlinson 433 U.S. 321, 324 (1977).

Western cites in support of its proposed stand, the fact that it is required by its statutory obligation, 49 U.S.C. § 1421(b) to fly not only safely but "with the highest possible degree of safety." It argues that neither juries nor judges have the expertise to pass judgment over an airline's judgment as to

how to maximize safety; i.e., here, to second guess an airline's judgment as what expert to believe with regard to the relationship between aging and safe performance as a flight engineer. Its argument, in other words, is that the overwhelmingly important role of safety in the work of commercial airlines requires deference to the airlines judgment in all safety matters, even if this means tolerating substantial diversity among airlines with regard to their judgment on such matters as whether an airline can maximize safety while still employing over 60 flight engineers. FEIA agrees with Western that juries and judges are not and cannot become sufficiently expert in safety matters to, in effect, legislate safety standards for the airline

industry. However, the answer to this is not for the courts to defer to the airlines such matters as that at hand. On the contrary, the technical nature of such questions clearly places them within what this court has termed "primary jurisdiction" of the FAA, United States v. Western P.R. Co., 352 US 59 (1956). Plainly, the FAA is the agency charged by the Congress with acquiring, maintaining and applying technical expertise in airlines safety matters. It is the sole public tribunal properly equipped to answer the question of whether an airline may, consistent with its statutory safety obligation, continue to employ flight engineers beyond the age of 60.

Had the FAA not already spoken on this matter, we believe that the doctrine of primary jurisdiction might well have led this court to refer the matter to the FAA, even at this late stage in the proceedings and even in the absence of such an argument by the parties, United States v. Western P.R. Co. supra at 62-3. However, the FAA has in fact already spoken on this matter: exercising its statutory mandate that "in issuing certificates under this title" (e.g. in issuing certificates to over 60 flight engineers) it "shall give full consideration to the duty resting on air carriers to perform their services with the highest possible degree of safety" 49 U.S.C. 1421(b), the FAA grants - and has always granted - certificates to flight engineers after

the age of 60. Clearly, the FAA has determined that permitting flight engineers to fly after the age of 60 is consistent with a carrier's duty "to perform their services with the highest possible degree of safety."

The FAA's determination on this matter, one within its primary jurisdiction, precludes Western's argument that the courts' lack of technical expertise requires them to defer to any airline's safety judgment, so long as it has some "basis in fact." On the contrary, in light of the FAA's determination, the burden imposed by the District Court on Western should be viewed as a minimal burden, not as one that is impermissibly heavy.

ARGUMENT

The challenged jury instruction given by the court regarding the BFOQ defense fall into two categories.

First, the court instructed the jury that:

> The BFOQ defense is available only if it is reasonably necessary to the normal operation-essence-of defendant's business. In this regard, I instruct you that the normal operation-essence-of Western's business is the safe transportation of air passengers.

Second, the court stated precisely that, in the particular circumstances of this this case, Western might establish its BFOQ by "proving"

> (1) that in 1978, when these plaintiffs were retired, it was highly impractical for Western to deal with each Second Officer over age 60 on an individualized basis

> to determine his particular ability to perform his job safely, and
> (2) that some Second Officers (flight engineers) over age 60 possess traits of physiological, psychological, or other nature which preclude safe and efficient job performance that cannot be ascertained by means other than knowing their age.

Western sets forth three related aspects in which it urges that the court erred by these instructions (Western brief, p. 13). We examine Western's grounds for these objections below, discussing, first, the burden of proof imposed by the District Court (which is directly related to how much "deference" is properly due to an airline's judgment in safety matters); and, second, the proper role of the FAA's judgment in all

airline safety questions that may require resolution by a court in discrimination cases.

A. The Standard of Proof Imposed by The District Court For Establishing A Bona Fide Occupational Qualification Was Proper.

The District Court required that to establish its BFOQ defense, Western "prove" both that "some" over 60 flight engineers are unsafe and that it is "impossible or impractical" to use existing medical knowledge to distinguish those who are safe from those who are unsafe.

Western's attack on these instructions initially takes the form of a lengthy analysis and elaboration of the Fifth Circuit's opinion in Usery v. Tamiami Travel Tours, Inc., 531 F 2d 224 (5th Cir., 1976). This is ironic, in view of the fact that the Tamiami court's analysis of the BFOQ defense accords entirely with the District Court's challenged instructions here. Indeed, the District Court's instructions below

could well have been derived directly from the alternative means set forth in Tamiami for satisfying what has been known as the second "prong"[1] (the "Weeks prong" of the Tamiami BFOQ test.

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[1]The first "prong" was referred to by the court as the "Diaz prong," after Diaz v. Pan American World Airways, 442 F 2d 385 (5th Cir.) cert. denied 404 U.S. 950 (1971). By the Diaz prong the court limited the applicability of BFOQ defenses to situations where the alleged detriment to the employer from not discriminating would undermine the essence of its business operation, Usery v. Tamiami Travel Tours, Inc., supra at 235. The Diaz prong, explained the Tamiami court, covers "attempts to discriminate on the basis of job descriptions not related to the essence of the employer's business." Usery v. Tamiami Travel Tours, Inc. supra at 235, fn. 27.

As set forth by the Fifth Circuit, the Weeks "prong" of the test for a valid BFOQ is the requirement that the employer shoulder one of the two following burdens:

> 1. "...the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."

531 F 2d at 235, quoting Weeks v. Southwestern Bell Telephone supra at 235.

> 2. "...even when the emloyer cannot carry this burden, if it demonstrates "that it is impossible or highly impractical to deal with women on an individualized basis, it may apply a reasonable rule."__ 408 F.2d at 235 n. 5.... One method by which the employer can carry this burden is to establish that some members of the discriminated-against class possess a trait precluding safe and efficient job per-

> formance that cannot be ascertained by means other than knowledge of the applicant's membership in the class. id.

The challenged jury instructions below does no more than rephrase the Tamiami court's above quoted alternative version of the Weeks prong of its BFOQ test: the instructions require no more than that Western "establish"[2] (i.e. prove) "that some members of the discriminated against class possess a trait precluding safe and efficient job performance that cannot be ascertained by means other than knowledge of the applicant's membership in the class..." -

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[2]Later in its opinion the Tamiami court 531 F 2d at 237, used the word "demonstrate," another legal synonym for "prove" to define the quantum of proof necessary to meet this second version of the Weeks prong.

i.e., that medical tests cannot distinguish a "safe" over 60 flight engineer from one likely to suffer a stroke.

The Fifth Circuit's evaluation of the record below in Tamiami makes it further clear that, to establish a BFOQ by the relevant Weeks test, it required "proof" that was "accepted" by the trier of fact: after noting that a statistical correlation between age and accident frequency could not function as such proof (because the correlation might be to identifiable physical defiencies), the court noted that "Tamiami did present proof that, if accepted, would satisfy its BFOQ burden under Weeks (footnote 5)." 531 F 2d at 237. In the end, the court upheld the District Court because the District Court "was entitled to

credit fully" - and did credit fully - testimony "establishing" that "examinations cannot detect the relevant physiological and psychological changes 'with sufficient reliability to meet the special safety obligations of motor carriers...' ...This is a finding of fact...' id at 238.

The "two prong" Tamiami formulation has been applied by numerous courts to evaluating BFOQ defenses. Despite verbal variations in reciting the formula, the courts have consistently required that to meet the alternative version of the Weeks test, an employer must shoulder the burden of proving that it met the test.[3]

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[3]Such cases include those cited most frequently by Western. Murnane v. American Airlines, Inc. 677 F 2d 98, 100,
(footnote continued)

There is a plain need for courts to require that an employer prove by a preponderance of the evidence the second Weeks prong so as to establish a BFOQ.[4] This need, imposed as a matter of pract-

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(footnote continued from previous page) 101 (DC Cir., 1981) (conclusions bottomed on explicit "finding of fact"); Smallwood v. United Airlines, Inc., 661 F 2d 303, 309 (4th Cir., 1981) ("It has failed to show the impossible or impracticability of dealing with the applicants individually"); EEOC v. University of Texas Health Science Center 710 F 2d 1091, 1097 (5th Cir., 1983) (what was critical is that "The trial court chose to believe defendants experts"). Tuohy v. Ford Motor Co. 675 F 2d 842, 846 (6th Cir., 1982) (reversing a summary judgment for Ford, the court held that "the court must weigh Ford's evidence against that of Tuohy who asserts that medical science has the means of measuring physiological and psychological health independent of age..."); EEOC v. City of St. Paul 671 F 2d 1162, 1168 (8th Cir., 1982) ("The city did show the general debilitating effects of age... Such evidence is not sufficient to show that age is a BFOQ.")

[4]The Tamiami court itself stated that the (footnote continued)

ice by all the courts surveyed above, is plainly established by the obvious consequences of Western's argument to the contrary.

(footnote continued from previous page) first Weeks prong (where an employer believes that "all or substantially all" of a discriminated age class cannot do a job safely) might be satisfied merely by showing a "factual basis" for the belief.

Even if this standard is as low as Western urges (see discussion, infra), it should be clear, first, that this standard was not applied by Tamiami to the second Weeks; and, second, that there is a persuasive explanation for why the Fifth Circuit appears to have placed a lighter burden of proof upon an employer attempting to establish a BFOQ by his belief that all of a class was unable to perform a job safely, than on one admitting that many of the class could perform safely; the danger presented by requiring an employer to maintain employees, all of whom may be unsafe, is obviously substantially greater than a situation where the employer's own allegation only that some of the class are unsafe.

Finally, however, this court in Dothard v. Rawlinson 433 US 321 (1977) appears to have applied the higher "proof" standard to a successful employer

(footnote continued)

According to Western's argument, it was entitled to a jury instruction that it could satisfy the Weeks prong by simply producing a "factual basis" for its belief that some over 60 flight engineers are unsafe because of the effect of age on their physical and psychological condition, and that medical science could not distinguish the safe

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(footnote continued from previous page) attempt to establish a BFOQ by a belief that all women could not function safely as prison guards: this Court made plain that its decision was grounded upon proof ("substantial testimony on both sides," id at 336) that "...the use of women as guards in 'contact' positions under the existing conditions in Alabama maximum security male penitentiaries would pose a substantial security problem directly linked to the sex of the prison guard." id

That this court applied a "proof' standard, not a "factual basis" standard in Dothard to a BFOQ definition under what may be termed the first Weeks prong test, should help establish the appropriateness of that standard for both versions of the Weeks prong.

over 60 flight engineers from those who are unsafe. Further, Western contends (Western brief, p. 28) that, where safety questions are involved, a "factual basis" is automatically established by doing no more than presenting a "qualified expert" to support the employer's belief. In other words, whenever a safety sensitive position is involved, discrimination against a race, a religious group, or an age group can be licensed by a "qualified expert." The jury, under this view, is not permitted to review (or, in Western's term "speculate", brief, p. 28) "the sufficiency of the medical evidence"; on the contrary, its sole function would be little more than determining whether the employer's expert is "qualified." But if juries are unqualified to review medical

evidence, how are they to sit in judgment on the qualifications of of individuals, the length of whose resumes and titles, are invariably overwhelming?

Thus the thrust of Western's position is that in a matter such as that at hand, the employer who produces a "qualified expert" must be given virtually unreviewable license to discriminate. That "qualified experts" can be found to support a myriad of wild scientific theories is a matter that should require no proof whatever.[5]

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[5]Indeed, Western itself makes this point by its "commonsensical" attacks on plaintiff's expert witness below, Dr. Mohler (Western's brief, p. 38, fn 35). The District Court below made rather more damaging observations on the expert testimony of Western's "qualified expert," whose paper qualifications are detailed with great solemnity by Western in its brief, p. 38, fn. 36). Said the court: "...the age 60 Rule has never

(footnote continued)

The consequences of this position are radical indeed. Recent industrial disasters have made it obvious that the airline industry is by no means unique in its capaicty to generate tragedies of enormous scope: because of Bhopal, the chemical industry is currently only the most dramatically obvious rival to the

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(footnote continued from previous page) been applied by the FAA to flight engineers. Western's expert testified that during the period that he was the Deputy Federal Air Surgeon, he never recommended or advocated that it be so applied." 514 Supp. at 390.

There is something basically and obviously wrong with a legal standard that prevents a jury from passing on the reliability of an expert who, when he was in an official position that would enable him to implement his views, failed to even advocate them (assuming he in fact held them). It would be too cruel an irony if such an expert, whose "views" not only did not prevail with the FAA while he was an FAA official, but were not even urged to the FAA, were given by this court what is in effect irrreviewable discretion to license discrimination against plaintiffs.

airlines as a field that requires the utmost safety consciousness. Because of this, are we to license the chemical industry to establish an age 60 rule merely on the basis of the testimony of a "qualified expert," unreviewable by a jury?

Finally, the consequences of Western's argument must be set in the context of the facts concerning the actual operations of today's airline industry. Western's argument is that it must be permitted to discriminate against over 60 flight engineers because juries are incapable of judging safety sensitive scientific questions on which experts differ. Such an argument might carry more weight if we were dealing with a matter such as a scientific dispute re-

garding the production and shipment of a new toxic substance: one hopes that the government regulations on such matters would encourage industry to "err" on the conservative side in their decisions. But this case does not involve such a question. Rather, we deal with a question regarding which a great fund of practical experience has been acquired over time by a number of the largest airlines: TWA and Pan Am have permitted over 60 flight engineers since the 1978 ADEA amendments.[6] American's flight engineers (represented by this amicus FEIA) have flown past age 60 since long

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[6]Prior to those amendments, TWA and Pan Am flight engineers retired at age 60 not because of any safety concern by those airlines, but because the normal retirement date in their retirement plans was age 60.

before 1978.[7] Indeed, as the District Court below noted, half the pilot population work for carriers which employ flight engineers past the age of 60, 514 F Supp. at 390. The experience of these airlines, both in their own view and in the view of the FAA, has shown that flight engineers can be employed past age 60 by airlines which maintain the "highest possible degree of safety," 49 U.S.C § 1421(b). Yet, Western's position would require a jury to virtually ignore this crucial evidence and experience, since the jury - under Western's view - would be limited to approving an airline's judgment, so long as the judgment was supported by a "qualified expert."

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[7]American's retirement plan for flight engineers provided that normal retirement age was 65.

Such a limitation on age discrimination rights flies in the face of this court's injunction that the BFOQ defense remain "an extremely narrow exception" to the law, Dothard v. Rawlinson, supra at 334; in the face of the accepted principle that the BFOQ defense should be determined by objective not subjective standards;[8] and in the face of a common sense view of the significance of the long experience of American Airlines - and the shorter experience of TWA and Pan American - in evaluating the safety of over 60 flight engineers, Western's proposed standard of proof and its proposed instruction regarding its discretion in safety matters, should be

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[8]See e.g. EEOC v. Texas Health Science Center, supra at 1096; Monroe v. United Air Lines, Inc. 736 F 2d 394, 404 (7th Cir., 1984).

should be rejected. No BFOQ defense should be permitted without requiring proof by at least a preponderance of the evidence that some members of the discriminated against class are unsafe, and that modern medicine cannot distinguish who those who are safe from those who are not. Absent such a standard, any "qualified expert" will be granted the power to authorize bludgeon-like discriminatory solutions to problems that have not even been shown to exist.

B. The Role of the FAA

Western's brief expresses its concern with the fact that judges and juries are not particularly well equipped to resolve conflicts between scientific experts (Western's brief, p. 30). From

this, it argues that courts should defer to the airlines' "special expertise in aviation safety..." (id at p. 31).

FEIA shares with Western its belief that judges and juries are not ideally suited to resolve scientific questions dealing with the relationship between aging and flight engineer safety. Indeed, the current legal state of affairs illustrates an additional difficulty with consigning such questions to case by case resolution in the courts: even as a jury in California may determine the issue one way for Western Airlines in Criswell, and be upheld (assuming proper juries instructions) so long as its conclusions are not clearly erroneous, a jury in Chicago may resolve the question in the opposite manner, and

also be upheld, see Monroe v. United Airlines supra. The law would not even differ from Circuit to Circuit; it would, instead, differ from airline to airline and would depend for each airline (and for its older flight engineers, as well as for the entire flying public) on the personalities and abilities of individual judges and jurors.[9] FEIA believes that the rights of flight engineers, as well as the issue of public safety, are too important to subject them to so great a range of different resolutions.

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[9]But see Air Line Pilot v. TWA, Inc. 713 F 2d 940 (2d Cir., 1983) cert. granted (as to other questions) ___US___, 104 S. Ct. 1412, 79 L Ed 2d 739 (1984), where the court (refusing to pass on a BFOQ claim by ALPA) stated that "the evidence is overwhelming that an age 60 Rule is not reasonably necessary to insure safety standards," id at 949, and further noted that this has been the finding of every court on the issue, id at 950.

However, the approach of Western compounds rather than solves this problem: instead of the mild discipline toward uniformity which has been enforced up until this time by the facts and the law (as it has existed until now), Western proposes (as discussed above) that courts defer to the judgment of every airline on the issue, so long as the airline can cite a "qualified expert" in support of its position.

FEIA submits that, rather than meeting this problem by abdicating their roles as Western in effect argues, courts should resolve the problem by reference to the statutory role of the FAA as the Congressionally designated repository of expertise in the field of all airline safety matters.

This court, in U.S. v Western P.R. Co. 352 US 59 (1956) has set forth two distinct reasons why such an approach would be desirable.

First, the court noted that a "desirable uniformity" is obtained by referring such matters to a "specialized agency" id at 64. Such "uniformity" is at least as desirable in matters affecting fundamental employment rights and public safety as it is in tariff cases.

Second, such an approach makes use of the expert and specialized knowledge of the agencies involved..." Here again, the relevance of the expertise of the FAA is too obvious to require comment id.

The combination of these two factors, this Court stated, rendered it "firmly established" - even as early as 1956 - that:

> Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." Id. 342 US at 574, 575.

The relevance of this principle to problems in the area of age discrimination and safety was strongly urged by the lengthy and well-reasoned concurrence of Chief Judge Brown (specially concurring with his own opinion) in Usery v. Tamiami

Travel Tours, Inc. supra at 239-248. There, Judge Brown made clear his opinion that, where an administrative agency is charged by Congress with responsibility for safety policy in a particular field, its expertise should be sought and - deferred to[10] - under the doctrine of primary jurisdiction, whenever an employer raises safety matters in a BFOQ defense to a discrimination action:

> "...in the determination of a factor as decisive as the age of employment having such universal application an administrative agency with its broader power of inquiry should be in a better position to evaluate the various factors pro and con than a Court on the limited record--no matter how long the trial--that traditional adversary rules of evidence bring about....

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[10]Judge Brown did not address the issue of the precise degree of deference to an agency's opinion that would be appropriate.

> it is the capacity of an administrative agency to marshal the abundant material from all aspects of a given industrial activity that gives to this important governmental machinery its acceptable expertise." 531 F 2d at 243-4.

Judge Brown went on to analogize the question of the relationship between safety and age to a legislative, rather than an adjudicate fact,[11] and to opine that such matters are most appropriately resolved by the administrative process (where an appropriate agency exists):

> Though a court, with its adversary procedure, is not necessarily precluded from resolving issues of legislative fact, Bordens Farm

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11"...the decision of a Court (sustained on appeal) that a given age for employment of interstate bus drivers is or is not acceptable is a legislative judgment in its operative effect in the sense that while court-determined on a record presented by the immediate parties, it has an industry-wide effect." 531 F 2d at 244.

> Products, Inc. v. Baldwin, 1934, 293 U.S. 194, 55 S.Ct. 187, 79 L.Ed. 281, it is generally thought that their determination is particularly appropriate to the administrative process where staffs of specialists and great storehouses of information are available. 531 F 2d at 245.

Finally, Judge Brown made certain observations on the difficulties of the trier of fact in resolving scientific questions that are of importance to public safety. The observation probably applies directly to all the over age 60 flight engineer litigation currently in progress:

> In deciding such a serious problem the trier ought not to be left, as was the Judge below, in the predicament of trying to choose the view pro and con of the incumbent Deputy Director of the Bureau of Motor Carrier Safety who, as a witness, supported the government's position but who was opposed

> by equally explicit contrary testimony from his immediate predecessor who likewise appeared as an expert witness but on behalf of the carriers. 531 F 2d at 246.

FEIA agrees with Judge Brown that the most appropriate initial trier of fact on the question of the safety of over 60 flight engineers is not a court or jury (nor, as Western would have it, the employer itself), but the FAA. Indeed, had this case reached this court without an opinion from the FAA on the question at issue, FEIA might well have urged - as did Judge Brown in Tamiami, 531 F 2d at 248 - that this court, pursuant to the doctrine of primary jurisdiction, send the question to the FAA for its opinion on the matter.[12] Such re-

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[12] In U.S. v. Western P.R. Co. 352 US 59, 63 (1956), this Court remanded an issue (footnote continued)

ferral here, however, is unnecessary, since the FAA has already spoken on this matter.

The Federal Aviation Act, 49 U.S.C. § 1421(b), does not simply grant to the FAA the power to set minimum standards for pilots and flight engineers while leaving to carriers the duty of setting higher standards; the role of the FAA as it bears on the question at hand, cannot be analogized to that of a Motor Vehicle Department, which does no more than issue drivers' licences to a pool of potential professional drivers. On the contrary, 49 U.S.C. § 1421(b) requires that: "...in issuing certificates under

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(footnote continued from previous page) to the ICC despite the fact that neither party questioned the Court of Claims view that the question was properly before the court and referral to the ICC was inappropriate.

this title the Administration shall give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety..." What this means is that by the very act of continuing to certify the fitness of flight engineers and the carriers who employ them to serve past the age of 60, the FAA has determined that carriers may employ them consistent with their duty "to perform their services with the highest possible degree of safety."

It is clear that this determination by the FAA should be regarded by this Court as a resolution by the appropriate expert agency of the question of whether an age 60 Rule is "reasonably necessary" for an airline to operate with

maximum safety. The FAA has determined that it is not; this determination of "legislative fact" should be deferred to by all courts passing upon the matter. By so holding, this court will assure both the "desirable uniformity" and the use of appropriate agency expertise that the court outlined as proper goals in U.S. v. Western P.R. Co., supra.

The jury below, of course, was not instructed to defer to the FAA's judgment (although that judgment was before the jury, see 514 F. Supp at 390). However, the consistency of its findings (as well as those of every other trier of this question) with the judgment of the FAA require that its verdict be upheld by this Court.

CONCLUSION

The judgment below should be confirmed.

Respectfully submitted,

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BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1984

WESTERN AIR LINES, INC., PETITIONER

v.

CHARLES G. CRISWELL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the standards for a bona fide occupational qualification applied below properly reflect the requirements of the Age Discrimination in Employment Act and are consistent with the safety responsibilities of public carriers.

2. Whether, when plaintiff employees have demonstrated a company policy of differences in treatment between older and younger workers, the employer has the burden of proving that those differences are due to reasonable factors other than age.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
Summary of argument	5
Argument:	
I. The BFOQ standards applied below are those required by the ADEA and are consistent with the safety responsibilities of public carriers	6
II. Where, as here, the plaintiffs have proved a pattern of age-based differential treatment, the employer bears the burden of proving its entitlement to the statutory affirmative defense that the disparity is due to a reasonable factor other than age	22
Conclusion	31

TABLE OF AUTHORITIES

Cases:

A.H. Phillips, Inc. v. *Walling*, 324 U.S. 490	10
Albermarle Paper Co. v. *Moody*, 422 U.S. 405	21
Alloy International Co. v. *Hoover-NSK Bearing Co.*, 635 F.2d 1222	15
Arnold v. *Ben Kanowsky, Inc.*, 361 U.S. 388	10
Arritt v. *Grisell*, 567 F.2d 1267	11, 16
Corning Glass Works v. *Brennan*, 417 U.S. 188	23
Crosland v. *Charlotte Eye, Ear & Throat Hospital*, 686 F.2d 208	20
Dothard v. *Rawlinson*, 433 U.S. 321	8, 11, 26
EEOC v. *Bordens*, 724 F.2d 1390	29
EEOC v. *City of St. Paul*, 671 F.2d 1162	16, 23
EEOC v. *County of Santa Barbara*, 666 F.2d 373	11, 14
EEOC v. *Goodyear Tire & Rubber Co.*, 22 Fair Empl. Prac. Cas. 786	23
EEOC v. *University of Texas*, 710 F.2d 1091	21

Cases—Continued: Page

EEOC v. *Wyoming*, 460 U.S. 226 ..... 7, 9, 21
Geller v. *Markham*, 635 F.2d 1027, cert. denied, 451 U.S. 945 29
Griggs v. *Duke Power Co.*, 401 U.S. 424 11
Harriss v. *Pan American World Airways, Inc.*, 649 F.2d 670 13
Heiar v. *Crawford County*, 35 Fair Empl. Prac. Cas. 1455, 746 F.2d 1190 ..... 13, 16
Houghton v. *McDonnell Douglas Corp.*, 553 F.2d 561, cert. denied, 434 U.S. 966 11
International Brotherhood of Teamsters v. *United States*, 431 U.S. 324 ..... 24, 29
Krieg v. *Paul Revere Life Insurance Co.*, 718 F.2d 998, cert. denied, No. 83-1383 (Apr. 2, 1984) 25
Laugesen v. *Anaconda Co.*, 510 F.2d 307 ..... 22, 23
Leftwich v. *Harris Stowe State College*, 702 F.2d 686 29
Levine v. *Fairleigh Dickinson University*, 646 F.2d 825 30
Loeb v. *Textron, Inc.*, 600 F.2d 1003 ..... 24, 27
Lorillard v. *Pons*, 434 U.S. 575 18
Los Angeles Dep't of Water & Power v. *Manhart*, 435 U.S. 702 12
Marshall v. *Westinghouse Electric Corp.*, 576 F.2d 588 ..... 24, 25
Massarsky v. *General Motors Corp.*, 706 F.2d 111 .. 22, 25
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 .. 6, 24, 25, 27, 28
Monroe v. *United Air Lines, Inc.*, 736 F.2d 394, petition for cert. pending, No. 84-774 29
Orzel v. *City of Wauwatosa Fire Dep't*, 697 F.2d 743, cert. denied, No. 83-205 (Nov. 28, 1983) .. 10, 11, 13, 14, 16
Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 26
Schwager v. *Sun Oil Co.*, 591 F.2d 58 25
Sexton v. *Beatrice Foods Co.*, 630 F.2d 478 24
Smallwood v. *United Air Lines, Inc.*, 661 F.2d 303, cert. denied, 456 U.S. 1007 ..... 10, 24
Stewart v. *Smith*, 673 F.2d 485 11
Texas Department of Community Affairs v. *Burdine*, 450 U.S. 248 ..... 24, 25

Cases—Continued: Page

Tuohy v. *Ford Motor Co.*, 675 F.2d 842 ..... 11, 13
United States v. *Park*, 421 U.S. 658 15
Usery v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224 .. 3, 4, 5, 11, 12, 13, 14, 16
Zemel v. *Rusk*, 381 U.S. 1 26

Statutes and regulations:

Age Discrimination in Employment Act of 1967, 29 U.S.C. *621 et seq.*:
§ 2(a)(2), 29 U.S.C. 621(a)(2) 6-7, 29
§ 2(b), 29 U.S.C. 621(b) 7
§ 3, 29 U.S.C. 622 8
§ 4(a), 29 U.S.C. 623(a) 7, 22
§§ 4(a)-(e), 29 U.S.C. 623(a)-(e) 22
§ 4(f), 29 U.S.C. 623(f) 9, 22, 23, 26
§ 4(f)(1) 29 U.S.C. 623(f)(1) ..... *passim*
§ 4(f)(2) 29 U.S.C. 623(f)(2) 20, 24, 30
§ 7(c)(2), 29 U.S.C. 626(c)(2) 18
Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*:
42 U.S.C. 2000e-2(e)(1) .....
42 U.S.C. 2000e-14 7
29 U.S.C. 206(d) 23
14 C.F.R. 121.383(c) 2
29 C.F.R.:
Section 860.102(b) (33 Fed. Reg. 9172 (1968)) 11
Section 860.103(e) (33 Fed. Reg. 9173 (1968)) 26
Section 860.103(f) (33 Fed. Reg. 9173 (1968)) 23, 26
Section 1625.6 (46 Fed. Reg. 47727 (1981)) 11
Section 1625.7 (46 Fed. Reg. 47727 (1981)) 26
Section 1625.7(e) 27

Miscellaneous:

Age Discrimination in Employment: Hearings on H.R. 3651, H.R. 3768, and H.R. 4221 Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 90th Cong., 1st Sess. (1967) 7, 8

Miscellaneous—Continued: Page

Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. (1967) 7, 8, 9
Adjudicating ADEA Disparate Treatment Claims Within the Evidentiary Framework of Title VII:
110 Cong. Rec. (1964):
p. 7213 8
p. 9913 7
pp. 13825-13826 9
112 Cong. Rec. 20820 (1966) 8
113 Cong. Rec. (1967):
p. 31253 23
p. 34742 7
p. 34746 7
123 Cong. Rec. 34319 (1977) 10, 17
124 Cong. Rec. 7886 (1978) 10
EEOC, *Legislative History of the Age Discrimination in Employment Act* (1981) 7, 8, 10, 11, 17, 21, 22, 23, 29
49 Fed. Reg. (1984):
p. 14692 ..... 2, 20
p. 14694 18
pp. 14694-14695 20
H.R. Rep. 914, 88th Cong., 1st Sess. (1963) 8
H.R. Rep. 805, 90th Cong., 1st Sess. (1967) 9, 17, 21, 22, 23
H.R. Rep. 95-950, 95th Cong., 2d Sess. (1978) 10
S. Rep. 723, 90th Cong., 1st Sess. (1967) 21, 23, 23
S. Rep. 95-493, 95th Cong., 1st Sess. (1977) 10
Sen. Spec. Comm. on Aging, 93d Cong., 1st Sess., *Improving the Age Discrimination Law* (1973) .. 23
U.S. Dep't of Labor, *The Older American Worker, Report of the Secretary of Labor* (1965) .. 7, 8, 17, 23, 29

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BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

The Equal Employment Opportunity Commission is responsible for the interpretation and enforcement of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*

STATEMENT

1. Petitioner refuses to employ any second officers[1] beyond age 60. This policy requires the involuntary retirement of incumbent second officers at age 60, and also requires senior captains and copilots to retire on their sixtieth birthdays even though there are vacant second

[1] Second officers (also called flight engineers under Federal Aviation Administration (FAA) regulations) are the third ranking crew members in the cockpit of certain of petitioner's aircraft (Pet. App. A2). The second officer monitors and adjusts a number of the mechanical systems on the plane, but is not involved in the flying of the plane (*id.* at A37-A38).

officer positions (Pet. App. A2-A3, A32-A33).[2] Respondents, who are two captains and a second officer involuntarily retired at age 60, brought this suit challenging petitioner's "age 60 policy" as a violation of the ADEA.[3]

2. Each of the respondents sought to continue working beyond his sixtieth birthday—respondent Ron to remain employed as a second officer; respondents Starley and Criswell, who were captains, to be transferred to the second officer position. Petitioner denied all three requests on the sole ground that the company's pension plan mandated retirement at age 60 (Pet. App. A3, A34; Tr. 61, 1161; PX 8, 14).

William Newell, the company official responsible for the decision to terminate respondents' employment, stated that he did not consider safety in making that decision (Tr. 61, 2056). In fact, he had no opinion and no knowledge concerning whether it was unsafe to employ flight engineers over 60 (Tr. 2027, 2059). No other official of petitioner testified that the company had either adopted the retirement age in the pension plan, or continued it in effect, due to considerations of safety. Nor did petitioner rely on the seniority provisions relating to downbidding in the collective bargaining agreement in denying the captains' requests to work past age 60 (PX 14).[4] Newell

[2] Under FAA regulations, individuals past the age of 60 may not serve as either captains or copilots (14 C.F.R. 121.383(c)). Neither this nor any other FAA regulation restricts the employment of flight engineers after the age of 60 (Pet. App. A2, A35). The FAA recently rejected a proposal to extend its "age 60 rule" to flight engineers, basing its decision on the significantly less critical nature of the job. 49 Fed. Reg. 14692 (1984).

[3] A subsequent class action by other captains and second officers of petitioner (*Stone* v. *Western Airlines*, D.C. No. 81-5521), in which the district court gave collateral estoppel effect to its decision in *Criswell*, was consolidated with that case in the court below. The petition here seeks review of both judgments.

[4] Respondents Criswell and Starley, who were near the head of the seniority list for flight officers, submitted bids for second officer vacancies. Starley's bid was initially granted, but the grant was rescinded shortly after petitioner rejected his request to continue working after his sixtieth birthday (Pet. App. A3, A33; PX 14, 15). Criswell's bid was also rejected (Pet. App. A3). Criswell and Starley challenged the denial of their bids under the grievance procedures provided by their union's collective bargaining agreement. The arbitration panel held that the denial of respondents' bids did not violate the agreement (*id.* at A84-A94). The panel concluded that, although the contract's language appeared to permit any captain to downbid on the basis of seniority to any second officer vacancy in wide-body planes, the parties had not meant to permit this where the downbid was filed "for the obvious purposes of evading the application of [the] agreed mandatory retirement plan" (*id.* at A89). In dissent, one panel member stated that the express language of the provision permitting the requested downbid was fully consistent with the collective agreement's seniority system, which established the right to "freedom of choice in bidding permanent vacancies" in accordance with a pilot's seniority (*id.* at A93).

testified that all three respondents were terminated for the same reason: the mandatory retirement age in the pension plan (Tr. 1161-1162).

3. At trial, petitioner argued that age less than 60 is a bona fide occupational qualification (BFOQ) for the flight engineer job (Pet. App. A34). Alternatively, petitioner claimed its refusal to permit captains and copilots to transfer to second officer positions is based on reasonable factors other than age (RFOA)—*i.e.*, a facially neutral policy against downbidding, embodied in its collective bargaining agreement (*id.* at A39). After a fifteen-day trial, the jury returned a verdict in favor of all three respondents (*id.* at A31-A32).

4. The court of appeals affirmed, holding the instructions proper and the verdict supported by substantial evidence. It rejected petitioner's argument that the instructions concerning the BFOQ defense did not ensure adequate consideration of its safety obligations. The court noted that the instructions conformed to the BFOQ standard first enunciated in *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976), and uniformly applied in the Ninth and other circuits (Pet. App. A10). The court held that the *Tamiami* test, as well as the language of the ADEA, requires proof that any age qualification is "reasonably necessary" to the essence of the

employer's business, not merely that the employer has a rational basis for it (*id.* at A11). The court concluded that it was sufficient that the jury had been told that the essence of petitioner's business is the safe transportation of passengers, and that second officers have to be able to perform their jobs both safely and efficiently (*id.* at A12). The court also held the instructions proper under the second prong of the *Tamiami* test, which requires a showing that either all or substantially all persons over the age limit would be unable to perform the duties on the job safely or efficiently, or that it is impossible or impractical to ascertain fitness on an individualized basis (*id.* at A12-A13).

In upholding the jury's findings, the court relied on evidence that the flight engineer position is not as critical to safety as the other cockpit positions. The court noted: that pilots under age 60 who become medically incapacitated to serve as captains or co-pilots are permitted to downbid to the second officer position (Pet. App. A14); that there had never been an accident caused by the disability of a second officer, and that the other crew members are fully trained to perform the flight engineer's duties in the event of his incapacity (*ibid.*); and that expert testimony showed that current diagnostic techniques can screen out those individuals over age 60 who are physically unfit to perform as flight engineers (*ibid.*). In light of this evidence, and the fact that other airlines employ more than 200 second officers over the age of 60 for service on wide-bodied aircraft, the court concluded that there was substantial evidence that petitioner's age 60 policy was not necessary to assure safety (*ibid.*).

The court also held the instructions proper on the RFOA defense—an affirmative defense, applicable only after the plaintiff has established the existence of disparate treatment (Pet. App. A16, A22). Relying on administrative interpretations of the RFOA defense and this Court's construction of a similar provision in the Equal Pay Act, the court held that the burden of proof of the RFOA defense was with the employer. The court concluded that the jury's verdict rejecting petitioner's RFOA defense was supported by "a great deal of evidence tending to show that Western did not administer its downbidding system in an age-neutral fashion, but rather that it routinely granted exceptions for younger pilots" (Pet. App. A8).[5]

SUMMARY OF ARGUMENT

I. The ADEA was designed precisely to overcome the sincerely held, but stereotypical, beliefs of many employers concerning the effects of aging on a person's ability to perform effectively. Age-based employment decisions were accordingly permitted only when age is *in fact* reasonably necessary to the job involved. As with the substantially identically worded Title VII BFOQ, the focus is on the objective requirements of the job, not the employer's beliefs about those requirements.

The test formulated in *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976), provides an appropriate method for analyzing a BFOQ defense: the employer must show first that its established job qualifications are reasonably necessary to the job involved; and second, that it is necessary to use age in determining which individuals satisfy those qualifications. The evidence at trial showed that in fact petitioner employs younger second officers who cannot satisfy the standards required of pilots. Its age 60 policy is thus flat age-based discrimination rather than a proxy for any other employment qualification. There is accordingly no need on this record to consider the second prong of the *Tamiami* test. There is, in any event, no merit to petitioner's argument that the second prong is satisfied by a mere showing that there is some rational basis for an employer's conclusion that in-

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[5] In its opinion, the court of appeals also affirmed a preliminary injunction reinstating second officer Albert White, which was entered in *Stone* v. *Western Air Lines* (Pet. App. A95). See n.3, *supra*. In a subsequent decision, the district court also issued a preliminary injunction reinstating the captains in the *Stone* case to second officer positions pending trial (Pet. App. A112). That order was not involved in the court below, and is not at issue here.

dividualized testing will not screen out employees who do not possess the qualifications it requires.

II. Petitioner confuses the principles for proof of discriminatory employment practices by circumstantial evidence outlined in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), with the proof of an RFOA. The RFOA applies when the employer asserts some uniform, age-neutral employment criterion to justify a *proven* differentiation among its employees, rather than when it presents an explanation of a merely prima facie showing of age bias as in the *McDonnell Douglas* type of case. The employer is properly assigned the burden of establishing the existence of the uniform employment criterion it asserts.

Respondent captains demonstrated an express company policy that deprived all pilots at the age of 60 of the opportunity to transfer to second officer positions, although younger pilots were permitted to do so. Rather than simply presenting a prima facie case, they thus proved express age-based disparate treatment. The only evidence petitioner offered to establish an RFOA was the arbitration award holding that the denials of the respondent pilots' downbids were proper under the collective bargaining agreement. But the collective bargaining agreement's failure to provide downbidding opportunities to older pilots on an equal basis with younger ones is not a defense under the ADEA, particularly when that failure implements a compulsory retirement policy that is itself illegal under the Act.

ARGUMENT

I. THE BFOQ STANDARDS APPLIED BELOW ARE THOSE REQUIRED BY THE ADEA AND ARE CONSISTENT WITH THE SAFETY RESPONSIBILITIES OF PUBLIC CARRIERS

A. One of Congress's primary objectives in enacting the ADEA was to end the then prevalent practice of establishing arbitrary age limitations for jobs, in order to ensure that older workers would be evaluated based on their individual ability rather than their age. 29 U.S.C.

621(a)(2), (b); U.S. Dep't of Labor, *The Older American Worker, Report of the Secretary of Labor* 5-7 (1965) (Labor Report).[6] The ADEA was preceded by extensive fact finding, which showed that age limits in industry were generally adopted without study and based on unfounded assumptions. Labor Report 6-10; 113 Cong. Rec. 34742, 34746 (1967); *Leg. Hist.* 23-37, 153, 157; *Senate Hearings* 34, 38. Congress enacted the broad prohibition in Section 4(a) of the ADEA (29 U.S. 623(a)) on the use of age in making employment decisions precisely because it found that, contrary to these assumptions, age is *not* a good predictor of ability; aging affects individuals at very different rates, and increasing experience and judgment generally compensate for any diminutions in functions. Labor Report 8-9; 110 Cong. Rec. 9913 (1964); *Leg. Hist.* 11, 25-26; *Senate Hearings* 38 (testimony of Secretary of Labor Wirtz). See *EEOC* v. *Wyoming*, 460 U.S. 226, 231 (1983).[7]

Thus, the sincerity of an employer's belief in stereotypical views of the value of older workers, far from providing a defense to the ADEA, was viewed as a significant

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[6] In the Civil Rights Act of 1964, Congress directed the Secretary of Labor to study age discrimination in employment and make recommendations for legislation to cure this problem. 42 U.S.C. 2000e-14. The report cited in the text resulted from this study and served as a prime impetus for the enactment of the ADEA. See *EEOC* v. *Wyoming*, 460 U.S. 226, 230-231 (1983). The report is reprinted, along with other documents comprising the legislative history of the ADEA, in EEOC, *Legislative History of the Age Discrimination in Employment Act* (1981) (*Leg. Hist.*). The hearings conducted on the ADEA by congressional committees are printed separately: *Age Discrimination in Employment: Hearings on H.R. 3651, H.R. 3768, and H.R. 4221 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 90th Cong., 1st Sess. (1967) (*House Hearings*); *Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. (1967) (*Senate Hearings*).

[7] These findings were reaffirmed by Congress in the mid-1970's when it considered ways to strengthen the ADEA. *Leg. Hist.* 227, 343-344, 372, 412, 427, 435, 481.

part of the problem; a primary focus of the Act is on research and education to correct just such honest misconceptions (29 U.S.C. 622; *Senate Hearings* 37-38 (statement of Secretary of Labor Wirtz); *House Hearings* 8-9 (same); S. Rep. 723, 90th Cong., 1st Sess. 1, 3 (1967)). Nonetheless, Congress did recognize that there are some instances in which age is relevant to job performance. Labor Report 2; 113 Cong. Rec. 2467 (1967); *Leg. Hist.* 20, 66; *House Hearings* 10; *Senate Hearings* 37.[8] It therefore created an exception to permit age distinctions where "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. 623(f)(1).

The language of this BFOQ in the ADEA closely tracks that of the BFOQ in Title VII. See 42 U.S.C. 2000e-2(e)(1). In using similar language in the ADEA, Congress evidently intended it to be similarly interpreted.[9] As this Court recognized in *Dothard* v. *Rawlinson*, 433 U.S. 321, 334 (1977), the Title VII BFOQ is an "extremely narrow exception." See H.R. Rep. 914, 88th Cong., 1st Sess. 27 (1963); Interpretative Memo of Senators Clark and Case, 110 Cong. Rec. 7213 (1964). Moreover, it is clear that it turns on an objective showing of business necessity, and is not established by the employer's good faith belief, even when that belief is based on substantial evidence.[10]

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[8] The Secretary of Labor advised Congress that those instances would occur rarely, and that in almost all occupations individual assessment of ability could be made. *Senate Hearings* 38, 51-52; *House Hearings* 9.

[9] Indeed, the sponsor of an earlier bill to prohibit age discrimination that contained similar language referred to it as "the basic bona fide occupational qualification provision [consisting of] * * * words of art to take care of any valid employment problem because of age." 112 Cong. Rec. 20820 (1966); *Leg. Hist.* 51 (remarks of Senator Javits).

[10] On June 15, 1964, the Senate rejected, by a vote of 61 to 30, a proposed amendment that would have made the BFOQ exception available if "the employer involved believes, on the basis of substantial evidence, that the hiring of * * * an individual of a particular race, color, religion, sex, or national origin will be more beneficial to the normal operation of the particular business or enterprise involved or to the good will thereof than the hiring of an individual without consideration [of such characteristics]." Senator Case, a manager of the bill, asserted in the brief debate on the proposed amendment that it would "destroy the bill." 110 Cong. Rec. 13825-13826 (1964).

Nothing in the rather sparse legislative history of the BFOQ provision in the ADEA suggests that Congress intended a broader exemption than the BFOQ defense under Title VII.[11] Instead, in considering the ADEA, Congress apparently assumed that the BFOQ exception must be based on objective facts.[12] Indeed, in considering the ADEA Amendments of 1978, Congress explained how the BFOQ was to be established:

> * * * in certain types of particularly arduous law enforcement activity, there may be a factual basis for believing that subetantially all employees above a specified age would be unable to continue to perform safely and efficiently the duties of their particular jobs, and it may be impossible or impractical

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[11] Petitioner relies (Br. 16 n.9) on a passing remark by Secretary Wirtz that the exceptions in Section 4(f), which includes the BFOQ, are "obviously broad" (*Senate Hearings* 39). But the Secretary's testimony as a whole emphasized that individual ability, rather than age, should normally be the criterion for employment decisions. See, *e.g.*, *Senate Hearings* 51-52; cf. *EEOC* v. *Wyoming*, 460 U.S. at 230-233. Of course, the BFOQ exemption applies broadly in the sense that it is available for any category of positions in any business, so long as the requisite standard is met. And it may well be that age will more frequently be a BFOQ than religion, national origin or even sex. That, however, does not mean that the two Acts contemplate the use of different standards.

[12] For example, in urging that the Act should outlaw the practice of many airlines of refusing to permit stewardesses to serve after they reached age 32 or 35, a number of Representatives rejected the airlines' claim of a BFOQ as unpersuasive. "A bona fide occupational qualification which one airline can insist upon and another ignore, and which the same airline can use or drop to meet its own scheduling convenience, seems to us to lack something in the way of objective justification." H.R. Rep. 805, 90th Cong., 1st Sess. 14 (1967) (supplemental views).

to determine through medical examinations, periodic reviews of current job performance and other objective tests the employees' capacity or ability to continue to perform the jobs safely and efficiently.

Accordingly, the committee adopted an amendment to make it clear that where these two conditions are satisfied and where such a bona fide occupational qualification has therefore been established, an employer may lawfully require mandatory retirement at that specified age.

S. Rep. 95-493, 95th Cong., 1st Sess. 10-11 (1977).[13]

B. The courts and the administrative agencies responsible for enforcing the ADEA have recognized that the BFOQ, which carves out an exception permitting the very conduct the Act generally prohibits, must be construed narrowly, and that the burden is on the employer to establish its applicability. *Orzel* v. *City of Wauwatosa Fire Dep't*, 697 F.2d 743, 748 (7th Cir. 1983), cert. denied 83-205 (Nov. 28, 1983); *Smallwood* v. *United Air Lines, Inc.*, 661 F.2d 303, 307 (4th Cir. 1981), cert. denied, 456 U.S. 1007 (1982). See also *A.H. Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493 (1945); *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). In guidelines adopted shortly after the ADEA's enactment, the Department of Labor, which initially enforced the Act, stated:

[13] The committee amendment referred to was eventually eliminated in conference, because it "neither added to nor worked any change upon present law." H.R. Rep. 95-950, 95th Cong., 2d Sess. 7 (1978); *Leg. Hist.* 518. See also 123 Cong. Rec. 34319 (1977); *Leg. Hist.* 506 (Senator Javits, explaining that the BFOQ "can be proved * * * [when] the employer can demonstrate that there is an objective, factual basis for believing that virtually all employees above a certain age are unable to safely perform the duties of their jobs and where, in addition, there is no practical medical or performance test to determine capacity.").

Moreover, Representative Pepper, one of the principal authors of the bill that became the 1978 Amendments, emphasized that "[t]he exception under Section 4(f)(2) of the act is just that—an exception—and as such must be viewed in the narrowest sense" (124 Cong. Rec. 7886 (1978); *Leg. Hist.* 533). This same principle applies to the parallel exception in 4(f)(1), the BFOQ.

It is anticipated that this concept of a bona fide occupational qualification will have limited scope and application. Further, as this is an exception it must be construed narrowly, and the burden of proof in establishing that it applies is the responsibility of the employer, employment agency, or labor organization which relies upon it.

29 C.F.R. 860.102(b), 33 Fed. Reg. 9172 (1968).[14] When EEOC assumed the authority for enforcing the ADEA, it adopted this interpretation (29 C.F.R. 1625.6, 46 Fed. Reg. 47727 (1981)). This consistent long-standing administrative interpretation is entitled to great deference. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971); *Dothard* v. *Rawlinson*, 433 U.S. at 334.

The method of analyzing an employer's BFOQ claim established in *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976), gives proper effect to the congressional policies expressed in the ADEA.[15] It has been followed by every circuit that has addressed the issue.[16] The ultimate showing required is that the use of age as a criterion is "reasonably necessary" to the employer's business. To assist the trier of fact, *Tamiami* breaks this into two components. The first prong requires the em-

[14] This guideline is reprinted in a working paper on Improving the Age Discrimination Law prepared for use by the Senate Special Committee on Aging in 1973 (*Leg. Hist.* 215, 241). It was accordingly part of the record on which Congress acted in considering amendments to the ADEA. Those amendments indicate no disagreement with the agency interpretation of the BFOQ.

[15] Indeed, the explanations in the legislative history of the 1978 ADEA Amendments of the showing an employer must make to establish a BFOQ (see pp. 9-10, *supra*) essentially paraphrase the *Tamiami* analysis.

[16] *Orzel* v. *City of Wauwatosa Fire Dep't*, 697 F.2d 743, 753 (7th Cir.), cert. denied, No. 83-205 (Nov. 28, 1983); *Tuohy* v. *Ford Motor Co.*, 675 F.2d 842, 844-846 (6th Cir. 1982); *Stewart* v. *Smith*, 673 F.2d 485, 491 n.26 (D.C. Cir. 1982); *EEOC* v. *County of Santa Barbara*, 666 F.2d 373, 376 (9th Cir. 1982); *Arritt* v. *Grisell*, 567 F.2d 1267, 1271 (4th Cir. 1977); *Hougton* v. *McDonnell Douglas Corp.*, 553 F.2d 561, 564 (8th Cir.), cert. denied, 434 U.S. 966 (1977).

ployer to show that it has set certain job qualifications for the position in question which are "reasonably necessary" to the essence of the employer's business. 531 F.2d at 236. If this is established, then the employer must show that it is necessary to use age in determining which individuals meet these qualifications. This second prong can be met by demonstrating either that everyone above the age limit lacks the qualification, or that some individuals over the age limit lack the qualification and that those individuals cannot be identified through individualized testing. *Id.* at 235-236.

Petitioner concedes that the *Tamiami* test identifies the correct elements for a BFOQ (Br. 28).[17] It urges, however, that employers in industries with public safety responsibilities should have a very low burden of proof of these elements; that courts should defer to such an employer's decision to use rigid age limitations provided it is "reasonable." But Congress has never chosen to enact a special exemption from the ADEA for industries that have an impact on public safety. Its judgment was that such industries could meet their responsibilities through the means provided by the ADEA: either by setting stringent age-neutral qualifications and testing employees on an individual basis, or by using explicit age criteria if they could be shown to be "reasonably necessary" to the safe operation of the business. Indeed, the language of Section 4(f)(1) is flatly inconsistent with petitioner's argument. It carves out an exception only where age *is* a bona fide occupational qualification for the job, not where

[17] Petitioner nevertheless appears to suggest that it is sufficient if it shows a correlation between age and performance and that the age limit is "effective" in eliminating unqualified workers (Br. 19 n.15, 24 n.19). This is not sufficient under the *Tamiami* analysis, and is not consistent with the emphasis in the ADEA on requiring employers to base employment decisions on the actual abilities of individuals, not on group norms. Cf. *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 708 (1978) (even a true generalization about a protected class is an insufficient reason for disqualifying individuals to whom the generalization does not apply). It is only when age is the only practical method of eliminating unqualified workers that it is a BFOQ.

an employer acts with a good faith or rational belief that it is. Accordingly, every court of appeals that has considered this argument has squarely rejected a "rational basis" test for the BFOQ. *Heiar* v. *Crawford County*, 746 F.2d 1190 (7th Cir. 1984); *Orzel*, 697 F.2d at 749, 752-753; *Tuohy* 675 F.2d at 845; *Harriss* v. *Pan American World Airways, Inc.*, 649 F.2d 670, 677 (9th Cir. 1980).

1. Petitioner argues that courts should defer to an employer's selection of job qualifications whenever they are reasonable. This standard is simply inadequate to effectuate the Act's requirement that age limits be used only where older workers lack qualifications "reasonably necessary to the normal operation of the particular business." 29 U.S.C. 623(f)(1).

An employer nevertheless is accorded flexibility in establishing qualifications necessary to ensure safety. No court has ever questioned that protection of passengers is the "essence" of a public carrier's business (see *Tamiami*, 531 F.2d at 236; *Tuohy*, 675 F.2d at 844; *Harriss*, 649 F.2d at 677); such an employer can impose any job qualifications it wishes provided only that they are "reasonably necessary" to safety. This does not invite the trier of fact to substitute its judgment for that of the airlines, or to decide what is absolutely necessary to safety. It simply provides a basis for review of the chosen qualifications to ensure that they meet the statutory standards.[18] It generally will not be difficult to

[18] Petitioner incorrectly asserts (Br. 36) that the jury instructions here encouraged the jury to substitute its own judgment for that of petitioner as to what job qualifications would ensure safe operations. While the instructions did not track the *Tamiami* two-prong analysis as clearly as they might have, all the essential elements of that analysis were included. The jury was told that petitioner could establish a BFOQ by showing that some second officers over age 60 possess "traits of a physiological, psychological or other nature which preclude safe and efficient job performance" and that it was "highly impractical" to make individualized retirement decisions (Tr. 2627). This combines all the basic features of both prongs of the *Tamiami* test: it permits use of age if there

persuade the trier of fact that stringent qualifications are "reasonably necessary" where inadequate performance by the employee could create a risk of harm to many people. See, *e.g.*, *Orzel*, 697 F.2d at 755; *EEOC* v. *County of Santa Barbara*, 666 F.2d at 377.

Petitioner argues that it made a reasonable judgment to apply the same physical fitness qualifications to both pilots and second officers, in order to eliminate every possible risk of incapacitation of the second officer. Regardless of whether such a choice would, in a proper case, be sufficient to satisfy the first prong of the *Tamiami* test, petitioner's argument is simply without factual support in this record. The evidence showed that petitioner did not require the same level of medical qualifications for pilots and second officers. While pilots are required to pass a physical examination for a first class medical certificate every six months and have an electrocardiogram (EKG) annually, second officers need only a second class certificate based on a yearly examination that does not include an EKG (Tr. 67, 68, 592-593). Indeed, pilots who can no longer meet the high medical qualifications for pilots are permitted, under FAA regulations and petitioner's policies, to transfer to the second officer position, including pilots who have recovered from heart attacks, coronary bypass surgery, alcoholism and other medical problems (Pet. App. A14, A38; Tr. 411-413, 653, 663, 1591-1592; PX 169). Hence, petitioner's own judgment was that the position of second officer is one of lower risk and responsibility for which lesser qualifications and a somewhat higher risk of incapacitation are

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are qualifications (the absence of negative "traits") needed for safe performance that cannot practicably be determined through individualized testing. Moreover, the jury was told that the general standard by which it should judge petitioner's asserted BFOQ was whether it was "reasonably necessary" to the safe transportation of passengers (Tr. 2626). This standard obviously would have been applied by the jury in evaluating both the qualifications relied upon by petitioner and its use of age rather than individualized assessments.

acceptable.[19] The deference encompassed in the first part of the BFOQ test must obviously be to petitioner's actual practice in setting qualifications, rather than to its arguments at trial. Here, while the evidence showed that a high degree of fitness was required for flight engineers, it did not show—indeed, it refuted—that the same extremely low risk of incapacitation was necessary as is the case with pilots.[20]

Indeed, the evidence here showed that safety concerns were not in fact a motivating factor in petitioner's exclusion of persons age 60 and over from employment as second officers (see p. 2, *supra*). This would not in itself preclude a BFOQ defense. Significantly, however, this was coupled with the facts that petitioner actually applied to younger employees in this position standards of health or fitness that many older persons obviously could meet,

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[19] The flight engineer is not responsible for flying the plane (Pet. App. 38A; Tr. 7, 2261). His duties are limited to monitoring the electrical and mechanical systems of the aircraft (Pet. App. A38; Tr. 2262), and are performed under the direct supervision of the captain (Tr. 47, 377, 2044). In the event of incapacitation of the flight engineer, the captain and copilot are trained to perform his duties in addition to their own so that the flight can be completed safely (Pet. App. A14, A38; Tr. 329, 397, 504, 680-681, 957-958). Incapacitation of a flight engineer has never been a cause of or a factor in an accident (Pet. App. A14, A38; Tr. 696).

[20] Nor is there merit to petitioner's contention that the instructions were deficient because they did not specifically inform the jury that petitioner is obligated to provide "the highest possible degree of safety" (Br. 42-43). The jury was carefully instructed that safety was the essence of petitioner's business, and that flight engineers had to be able to perform their duties both safely and efficiently (Tr. 2626-2627). Petitioner, in its closing argument, reminded the jury of its duty to provide the "highest degree of safety" (Tr. 2514). From the evidence and their common experience, the jurors clearly understood the importance of prevention of airline accidents. Thus, petitioner's contentions were fully before the jury. The precise wording of the jury charge must be left to the discretion of the district court, provided that the instructions and record as a whole make clear that the jury's attention was focused on the proper issues and standards. *United States* v. *Park*, 421 U.S. 658, 674-676 (1975); *Alloy International Co.* v. *Hoover-NSK Bearing Co.*, 635 F.2d 1222, 1226 (7th Cir. 1980).

and that petitioner never claimed it could verify compliance with *those* standards by older employees only by using age as a proxy. Thus, petitioner wholly failed to establish that its age criterion was being used as a proxy for some other qualification that, arguably, is reasonably necessary to the second officer position. On this record, petitioner's discrimination against respondents was on the basis of age *simpliciter*. Accordingly, there is no need in this case to proceed with the second prong of the *Tamiami* analysis, involving the justifiability of using age as a proxy for another employment criterion.

2. In any event, petitioner has failed to make the requisite showing under the second prong as well. Petitioner argues that it should have to show only that it had a factual basis for believing that individualized testing (for its asserted non-age qualification) is not practicable and should not have to persuade the trier of fact by a preponderance of the evidence that the latter proposition is so (Br. 26-28).[21] In essence, petitioner asks that it be

[21] In support of this contention, petitioner cites a number of cases which, in stating the second prong of the BFOQ test, have said that an employer must show "reasonable cause, *i.e.*, a factual basis for believing" that either all older workers are unqualified or that individual testing is not possible. See, *e.g.*, *Tamiami*, 531 F.2d at 236; *Arritt* v. *Grisell*, 567 F.2d at 1271. This "reasonable cause" language has been used without consistency or explanation. Some courts use it only in reference to the first alternative showing that all older workers are disqualified; others use it to refer to the individualized testing showing as well. Compare *EEOC* v. *City of St. Paul*, 671 F.2d 1162, 1168 (8th Cir. 1982), with *EEOC* v. *University of Texas*, 710 F.2d 1091, 1093 (5th Cir. 1983). Moreover, the same court will include this phrase in some statements of the BFOQ test and omit it in others within the same opinion. See *University of Texas*, 710 F.2d at 1093, 1096; *Orzel*, 697 F.2d at 753, 755-756. Despite this semantic variation, no court has suggested that it is imposing a lighter burden on the employer than proof by a preponderance of the evidence that the BFOQ is justified. Rather, the courts have uniformly stressed that the employer has the burden of proving the existence of a BFOQ by objective evidence, and that a "reasonable basis" for the policy is insufficient. *Heiar* v. *Crawford County*, 35 Fair Empl. Prac. Cas. at 1468; *University of Texas*, 710 F.2d at 1093, 1094, 1096; *Orzel*, 697 F.2d at 748-749, 752, 755.

permitted to continue its mandatory retirement policy, even though the evidence at trial showed that it could deal with flight engineers on an individualized basis, simply because it assertedly acted with a rational belief that age was a BFOQ. Such a result would be contrary to the entire purpose of the ADEA, which was to require that older workers be accorded individual treatment to qualify for employment whenever possible. There is no indication that Congress wished to defer to employers' judgments about the need for age limits. Instead, Congress was concerned that employers were generally excluding older persons from employment without an adequate basis (pp. 6-8, *supra*). Its intent was to correct that situation, and to permit age limits only when their legitimacy could be objectively demonstrated. See, *e.g.*, Labor Report 7-9; 123 Cong. Rec. 34319 (1977 (Sen. Javits); H.R. Rep. 805, 90th Cong., 1st Sess. 14 (1967) (supplemental views); *Leg. Hist.* 24-26, 506. In our legal system, such a demonstration is made by proof by a preponderance of the evidence.

Contrary to petitioner's assertions (Br. 27), this does not require it "to prove medical science issues to a certainty." The instructions to the jury clearly negated any such requirement (Tr. 2618). Instead, petitioner had to persuade the jury only that "it was more likely true than not true" that the company could not assure sufficient qualifications without use of an age limit (Tr. 2618, 2627). This standard leaves room for an employer to make to the trier of fact many of the arguments petitioner makes in its brief.[22] If the evidence shows that credible expert testimony is divided on the efficacy of individualized testing, an employer can argue that the judge or jury should be conservative in evaluating the evidence, so as to ensure that high safety standards are met. There is no reason to believe that judges and juries, who are after all members of the traveling public, will be unsympathetic to such

[22] As explained pp. 14-15, *supra*, it is doubtful that the evidence at the trial here would have supported them.

concerns.[23] And the trier of fact can also be urged to weigh, along with other relevant concerns, the risk of making a wrong judgment for the particular job involved.[24]

Petitioner proposes, by contrast, a standard that would mean the employer must prevail if the jury finds any reasonable basis for its policy—essentially, if it presents any expert testimony or factual evidence to support its policy, even if that evidence is far less credible or persuasive than plaintiff's evidence. Such an approach is inconsistent with the legislative history discussed above;[25] it is not necessary to ensure safety and certainly is inadequate to protect the older worker's right to be judged as an individual except where age is a BFOQ.[26]

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[23] Congress specifically chose to entrust juries with the resolution of age discrimination claims, including those where a BFOQ defense is asserted. Section 7(c)(2) of the ADEA, 29 U.S.C. 626(c)(2); *Lorillard* v. *Pons*, 434 U.S. 575 (1978).

[24] Contrary to petitioner's assertions, the present case was not simply one where the jury was asked to credit one expert rather than another. Petitioner's expert agreed that medical tests could assure fitness of flight engineers on an individualized basis beyond age 60 (Tr. 1675-1678). He endorsed the age 60 policy primarily because he believed the FAA examination for flight engineers insufficient to assure cardiovascular and psychophysiological health (Tr. 1503, 1527, 1691). Petitioner presented no evidence that it would be impractical to use further tests. Such additional testing is, in fact, used by other airlines (Tr. 621-622, 1657-1658).

[25] Indeed, petitioner's proposed standard is the one contained in the Title VII BFOQ amendment rejected after Senator Case observed that it would "destroy the bill". See n.10, *supra*.

[26] Nor can petitioner rely on the FAA Age 60 rule to establish its BFOQ for flight engineers. The FAA rule does not apply to flight engineers, and the FAA has specifically announced that it does not regard the retirement of the flight engineer at age 60 as necessary to safety. 49 Fed. Reg. 14694 (1984). Similarly, the FAA findings as to the inability to test for pilot fitness on an individual basis did not relieve petitioner of its burden of proving that the lesser medical qualifications it required for flight engineers could not be tested on an individualized basis. Thus, testimony concerning the FAA findings was appropriately introduced, but not given conclusive weight on the issues in this case.

That petitioner failed to persuade the jury that it was necessary to use an age limit rather than an individualized approach in employing flight engineers reflects not onerousness in the standard of proof, but rather the unpersuasiveness of petitioner's evidence. The overwhelming evidence at trial showed that the qualifications for the flight engineer position could be ascertained through individualized testing. The basic health and fitness of all flight engineers is assured through an annual physical examination conducted under FAA guidelines (Tr. 613-614). Moreover, petitioner assesses the continued competence of its flight engineers through periodic inflight proficiency reviews, and tests conducted in sophisticated computerized flight simulators (Tr. 38-39, 45, 614).

While these tests serve to assure individual fitness at any age (Tr. 44, 450, 452, 532, 614), further tests are available which petitioner could use to test for specific disabilities sometimes associated with aging. Use of tests such as a risk factor analysis and a stress EKG are effective in eliminating those flight engineers who are at risk of suffering a heart attack or stroke in the next year (Tr. 621, 625, 628, 654-655). Similarly, mental impairments, such as a slowed reaction time, can be identified through individual testing (Tr. 637, 651, 998, 1039, 1417). We do not dispute, of course, that these tests cannot identify every flight engineer who might become incapacitated. The margin of error is, however, quite low.[27] Petitioner's practices show that this margin of error is tolerable in the flight engineer position. If it were not, petitioner could not continue to employ middle-aged flight engineers during the high risk years for cardiovascular illness with-

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[27] For example, the risk that a healthy 60 year old, who has none of the established cardiovascular risk factors, will develop coronary heart disease (not necessarily including a heart attack) in the next six years is only about six percent (Tr. 1586; PX 118). The risk of the same individual's suffering a stroke is less than one percent (Tr. 1587; PX 117). Use of a stress EKG could further screen out those with a risk of heart disease (Tr. 1585).

out even administering an EKG (Tr. 593, 679).[28] Nor could it re-employ individuals in this position following a prior heart attack, an event that substantially increases the risk of future incapacitation (Tr. 667, 707, 1586, 1589-1590).[29]

Thus, the evidence clearly showed that the level of qualifications needed for the flight engineer position could be ascertained on an individual basis, and the jury therefore properly concluded that age below 60 is not a "bona fide occupational qualification" for the job. This conclusion is buttressed by the facts that the FAA has never considered it necessary to extend its "age 60 rule" to flight engineers, 49 Fed. Reg. 14692, 14694-14695 (1984), and that other airlines employ flight engineers over 60 without any demonstrated reduction in safety (Tr. 266, 273, 955).[30]

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[28] The evidence at trial showed that of the eight in-flight deaths of flight officers on U.S. and foreign air carriers from January 1961 to April 1968, six occurred between age 41 and 50, one between age 30 and 40, and one between 51 and 60 (Tr. 679, PX 161a). Dr. Mohler, respondents' expert witness, explained that this was because individuals who are susceptible to heart disease generally develop it in the mid-40's (Tr. 679).

[29] The re-employment of individuals as flight engineers following heart attacks illustrates the efficacy of individual testing. Even with this high risk group, assessments can be made to determine which individuals are healthy enough and have a sufficiently low risk of recurrence to return to work as the third crewmember in the cockpit (Tr. 653-656, 663, 1590). Petitioner's own expert witness conceded that the statistics do not support the risk of heart attack as a major concern in this case (Tr. 1667).

[30] At trial, petitioner presented no evidence that safety had been considered in continuing its "age 60 policy" after the 1978 amendments to the ADEA eliminated the pension plan exemption in Section 4(f)(2) of the Act. (See *Crosland* v. *Charlotte Eye, Ear & Throat Hospital*, 686 F.2d 205, 213 (4th Cir. 1982)). Its director of employee benefits merely testified that he had continued the age 60 policy in the pension plan in the mistaken belief that the FAA age 60 rule applied to flight engineers (Tr. 1759, 1795-1797). After trial, during proceedings on injunctive relief, a company attorney testified that petitioner had held a two-hour meeting concerning plaintiffs' charges of discrimination and had,

Permitting an employer to escape liability if it merely can produce some evidence at trial to support its age-based policy would severely undermine the congressional intent to require employers thoughtfully to re-examine their use of age limitations and continue only those where age is a necessary qualification for the job. It is the prospect of liability under the Act that serves as a "spur or catalyst" for such self-examination. Cf. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417, 418 (1975). Moreover, requiring proof that an age limit is "reasonably necessary" to safety will cause employers to evaluate seriously both the needs of safety and their obligations to eliminate unnecessary age discrimination, with the possibility of a net gain to the public on both counts. Cf. *EEOC* v. *Wyoming*, 460 U.S. at 239.[31]

---

at that time, decided to continue the age 60 retirement for flight engineers, in part because it was a safety measure (Tr. 2823-2825). He did not indicate what facts, if any, this conclusion was based upon. He merely said that petitioner reasoned by analogy from the FAA rule because it "could not afford to go out and do a lot of research on its own" (Tr. 2827). In reaching this decision, petitioner never consulted either its own medical director or the medical expert called at trial concerning the necessity of age 60 retirement for flight engineers (Tr. 597, 1515).

[31] Petitioner also complains that requiring proof by a preponderance of the evidence of the BFOQ will lead to inconsistent results in different cases, because some juries will accept while others will reject the use of age. Giving controlling weight to the employer's judgment, however, would result in inconsistent treatment of employees of different airlines. Congress could have ensured uniform practices if it had chosen to enact a schedule of appropriate age limitations for different occupations. Instead, it decided to adopt a case-by-case approach. H.R. Rep. 805, 90th Cong., 1st Sess. 7 (1967); S. Rep. 723, 90th Cong., 1st Sess. 7 (1967); *Leg. Hist.* 80, 111. This approach gives the employer considerable discretion, requiring only that it be able to produce adequate evidence to back up any choice it makes. An employer who performs a thoughtful study before adopting an age limitation will be in a good position if its policy is challenged in court.

II. WHERE, AS HERE, THE PLAINTIFFS HAVE PROVED A PATTERN OF AGE-BASED DIFFERENTIAL TREATMENT, THE EMPLOYER BEARS THE BURDEN OF PROVING ITS ENTITLEMENT TO THE STATUTORY AFFIRMATIVE DEFENSE THAT THE DISPARITY IS DUE TO A REASONABLE FACTOR OTHER THAN AGE

A. Section 4(a)-(e) of the ADEA sets forth a broad proscription of employment decisions based on age. Section 4(f) then carves out certain exceptions from the Act's prohibitions.[32] Section 4(f)(1) states that it shall not be unlawful for any employer:

> to take any action otherwise prohibited under subsections (a), (b), (c) or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age.

Here, respondents alleged and proved a pattern of age-based differential treatment—thus showing that petitioner's conduct was "otherwise prohibited" by the Act. Once such a showing has been made, the exceptions from liability specified in Section 4(f)(1) obviously operate as affirmative defenses which permit the conduct despite its discriminatory nature. Under the RFOA exception, an employer can continue a practice that favors younger employees if the practice is shown to be based on "reasonable factors other than age." See *Laugesen* v. *Anaconda Co.*, 510 F.2d 307, 314-315 (6th Cir. 1975); *Massarsky* v. *General Motors Corp.*, 706 F.2d 111, 117 n.11, 123 n.20 (3d Cir. 1983).

Although the ADEA's legislative history does not contain extensive discussion of the RFOA exception, Congress did emphasize that the Act did not invalidate the use of legitimate job criteria such as reasonable physical

[32] The legislative history clearly identifies the provisions of Section 4(f), including the RFOA defense, as "exceptions" to the Act. H.R. Rep. 805, 90th Cong., 1st Sess. 4 (1967); S. Rep. 723, 90th Cong., 1st Sess. 9 (1967); *Leg. Hist.* 77, 113.

qualifications or tests for speed, and that an employer need not hire an older worker who could not meet these qualifications. H.R. Rep. 805, 90th Cong., 1st Sess. 7 (1967); S. Rep. 723, 90th Cong., 1st Sess. 7 (1967); 113 Cong. Rec. 31253 (1967) (remarks of Sen. Yarborough, floor manager); *Leg. Hist.* 80, 111, 144. Congress did, however, expressly limit the justification for differences in treatment to "reasonable" factors. Thus, the RFOA defense is available only where there is a business justification for the factor relied upon. See *Laugesen* v. *Anaconda Co.*, 510 F.2d at 314-315; EEOC Guidelines, 29 C.F.R. 860.103(f), 33 Fed. Reg. 9173 (1968).[33]

Since the RFOA provision creates an exception to the ADEA, it should be narrowly applied and, as with any affirmative defense, the employer bears the burden of proving its entitlement to the exemption.[34] This is precisely how this Court has treated an almost identical exception in the Equal Pay Act for differentiations based on "any other factor other than sex." 29 U.S.C. 206(d). See *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 196 (1974). There is no logical reason for treating the very similar exemption in the ADEA any differently.

Indeed, other exemptions in Section 4(f) of the ADEA have uniformly been interpreted as affirmative defenses upon which the employer has the burden of proof. See *EEOC* v. *City of St. Paul*, 671 F.2d at 1166 (BFOQ de-

[33] In describing the RFOA provision, Senator Yarborough noted that a reasonable factor is one that is related to the requirements of the job. 113 Cong. 31253 (1967); *Leg. Hist.* 144. Evidence before Congress showed, for example, that some facially neutral policies, such as rigid educational requirements, could unfairly and unnecessarily disadvantage older workers. Labor Report 3, 15; *Leg. Hist.* 21, 32. See also *Improving the Age Discrimination Law*, prepared for use by the Sen. Spec. Comm. on Aging, 93d Cong., 1st Sess. 6 (1973); *Leg. Hist.* 224.

[34] A showing of entitlement to the RFOA defense would ordinarily consist of proof of both the existence of a uniformly applied selection criterion that disqualified plaintiffs and of its reasonableness in the business context. See *EEOC* v. *Goodyear Tire & Rubber Co.*, 22 Fair Empl. Prac. Cas. 786, 787 (W.D. Tenn. 1980).

fense); *Smallwood* v. *United Air Lines, Inc.*, 661 F.2d at 307 (same); *Sexton* v. *Beatrice Foods Co.*, 630 F.2d 478, 486 (7th Cir. 1980) (bona fide employee benefit plan or seniority system defense under Section 4(f)(2) of the ADEA). In the present case, the only "reasonable factor" identified by petitioner was its seniority system. Since it clearly would have had the burden of proving this defense had it been pleaded under Section 4(f)(2), there is no reason why it should escape this burden merely because it chose to proceed under Section 4(f)(1).

In contending that an employer does not have the burden of proof of an RFOA defense, petitioner cites cases that have extended the order of proof devised by this Court for individual claims of discrimination under Title VII of the Civil Rights Act to comparable claims under the ADEA. Those cases, while properly decided, simply do not involve an RFOA defense. They involve alleged discrimination against an individual, where the dispositive issue was whether a particular employment action detrimental to the plaintiff was taken "because of [his] age." *Loeb* v. *Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979); *Marshall* v. *Westinghouse Electric Corp.*, 576 F.2d 588 (5th Cir. 1978). In such cases, the courts have properly applied the principles established in *McDonnell Douglas Corp.* v. *Green*, *supra*, and *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981). Under this method of proof, a plaintiff may make out a prima facie case without any direct evidence of discrimination if he can present evidence from which an inference of discrimination can properly be drawn. *McDonnell Douglas*, 411 U.S. at 802; *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 358 n.44 (1977). This is usually done by eliminating the most obvious reasons for the challenged personnel action, such as absence of vacancies or plaintiff's failure to meet the qualifications for the job. Once the plaintiff has made this showing, the employer is required to "articulate some legitimate, nondiscriminatory reason" for its action. *McDonnell Douglas*, 411 U.S. at 802. This does not shift the burden of persuasion to the

employer; it serves merely to narrow the focus of plaintiff's case to rebutting the specific reasons alleged for his rejection. *Burdine*, 450 U.S. at 254-256. The plaintiff can then discharge the ultimate burden of proving discriminatory motivation by demonstrating that the employer's proffered reasons are a pretext. This can be shown by evidence that discrimination more likely motivated the employer or by evidence that the employer's explanation is unworthy of belief. *Id.* at 256.

The statutory RFOA defense is not equivalent to the employer's interim burden at the second stage of a *McDonnell Douglas* type case. At the second stage of such a case, discrimination has not yet been established. The plaintiff has merely made a prima facie showing from which, if unexplained, an inference of discrimination will be drawn. See *Burdine*, 450 U.S. at 254 n.7. The employer's burden is not to prove a defense but merely to sharpen the inquiry into motivation by focusing the remainder of plaintiff's case on the asserted reasons for his rejection. The RFOA defense, by contrast, comes into play only after the plaintiff has proven its case-in-chief of discrimination—for example by showing a pattern of rejecting older candidates, or a policy that operates to deny employment opportunities to older individuals. The employer then must justify this discriminatory pattern or policy by showing that it resulted from the use of reasonable selection criteria.

Considerable confusion has arisen because employers have referred to their rebuttal of a plaintiff's prima facie showing under *McDonnell Douglas* as a defense of "reasonable factors other than age" under Section 4(f)(1). Courts have sometimes adopted this terminology in resolving these individual claims of discrimination, by describing the RFOA defense as nothing more than the articulation of legitimate nondiscriminatory reasons under *McDonnell Douglas*. See, *e.g.*, *Krieg* v. *Paul Revere Life Insurance Co.*, 718 F.2d 998 (11th Cir. 1983), cert. denied, No. 83-1383 (Apr. 2, 1984); *Schwager* v. *Sun Oil Co.*, 591 F.2d 58 (10th Cir. 1979); *Marshall* v. *Westinghouse Electric Corp.*, *supra*. While we have no

quarrel with the disposition of those cases, we believe the term "reasonable factors other than age" is best reserved for a true affirmative defense following proof of plaintiff's case-in-chief. As the Third Circuit has observed, equating the RFOA defense with an employer's mere denial of discriminatory motivation robs Section 4(f)(1) of any meaning—there is no need for an exception to the statute where age did not play a role in the personnel action to begin with. *Massarsky* v. *General Motors*, 706 F.2d at 117 n.11.

Our submission that the RFOA exception is an affirmative defense is also supported by the administrative interpretations of the ADEA. Initially, the ADEA was enforced by the Department of Labor. In guidelines published just six months after the passage of the Act, that agency identified the RFOA provision as a narrow exception to the Act concerning which the employer would bear the burden of proof. 29 C.F.R. 860.103(e), 33 Fed. Reg. 9173 (1968). Moreover, the guidelines identified the exception as applying to across-the-board selection or performance criteria (such as physical fitness tests or educational qualifications), which could be shown to be reasonably related to the demands of the job. 29 C.F.R. 860.103(f). This contemporaneous interpretation is entitled to great weight. *Dothard* v. *Rawlinson*, 433 U.S. 321, 334 n.19 (1977). Moreover, the fact that Congress gave thorough consideration to the Section 4(f) exceptions in 1978 when it amended the ADEA,[35] and yet did not alter their administrative interpretation, further strengthens the presumption that the interpretation accords with congressional intent. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969); *Zemel* v. *Rusk*, 381 U.S. 1, 11 (1965). When the EEOC assumed responsibility for ADEA enforcement, it continued to view the RFOA exception as applicable to general selection criteria used by an employer that disfavor older workers. 29 C.F.R. 1625.7, 46 Fed. Reg. 47727 (1981). It also continued to require the employer to present a business justification for these

[35] See n.14, *supra*.

criteria (*ibid.*), and continued to view the RFOA as an affirmative defense applicable after discrimination has been established. See preamble to final agency interpretations, 46 Fed. Reg. 47725 (1981) (interpretation not intended to apply to employer's burden of rebutting prima facie case).[36]

B. Petitioner raised the RFOA defense in response to respondents' claim that Captains Criswell and Starley had been denied transfers to the second officer position due to their age. Petitioner did not deny that it had a policy of requiring all 60-year-old pilots to retire rather than transfer to a lower position in the cockpit. Instead, it argued that this policy was due to "reasonable factors other than age" in that it had a general policy, reflected in its collective bargaining agreement, of prohibiting downward transfers by pilots.[37]

The issues concerning downbidding were not appropriate for analysis under the method outlined in *McDonnell Douglas*. Respondents were not challenging isolated terminations alleged to have been motivated by age bias.

[36] The EEOC guidelines did, however, add a clarification to address the confusion that had arisen between individual *McDonnell Douglas* type cases and cases involving classwide practices. In individual cases, the guidelines specified that the employer would bear "the burden of showing that the 'reasonable factor other than age' exists factually." The preamble to the interpretations cites *Loeb* v. *Textron*, *supra*, for this proposition (46 Fed. Reg. 47725 (1981)), indicating that in individual cases the EEOC had no intention to depart from the *McDonnell Douglas* approach. The guidelines, however, clearly distinguish these individual claims from those involving uniform classwide selection criteria. In our Brief as Amicus Curiae opposing certiorari in this case, we did not clearly distinguish between the subsection of the EEOC guidelines which addresses only individual claims of discrimination (Section 1625.7(e)) and those which address classwide selection criteria (Br. 11).

[37] This was an alternative defense, applicable only if the jury rejected petitioner's primary defense that age was a BFOQ justifying the exclusion of anyone over age 60 from the second officer position. Since this alternative defense concerned only downbidding, it did not apply to respondent Ron, who was already a second officer.

Rather they challenged an express, facially age-based company policy, which deprived all pilots at age 60 of the opportunity to transfer to second officer positions. In support of their claim, respondents did not merely show, as in a *McDonnell Douglas* type case, that they met the minimum qualifications for a vacant position. Instead, they produced direct evidence of disparate treatment. While all age 60 pilots were denied the opportunity to transfer to positions not covered by the FAA rule, petitioner had permitted more than 400 younger pilots to downgrade (Pet. App. A42; PX 28) in order to preserve their employment when displaced from their pilot positions for such reasons as reduction in force, medical disability, incompetence, personal hardship, or even for disciplinary reasons (Tr. 401, 406-416, 437-438, 1910-1913). These transfers occurred both pursuant to provisions of the collective bargaining agreement and in the absence of any applicable provision (Tr. 413, 1852, 1912, 1916-1917). The only displaced pilots who were not given such transfer opportunities were pilots affected by the FAA age 60 rule (Pet. App. A42).

The district court squarely placed upon respondents the burden of proving age discrimination by a preponderance of the evidence (Tr. 2621, 2630). No burden shifted to petitioner unless respondents persuaded the jury that their claim was true.[38] If the jury believed respondents' evidence showing a broad pattern of discrimination in transfer opportunities, then petitioner could not rebut this showing by merely articulating a

[38] The court of appeals interpreted the jury instruction as shifting the burden of proof of the RFOA defense to petitioner following the proof of respondents' case-in-chief of discrimination. If this is what the jury instruction did, it is correct, for the reasons discussed above. In fact, the instructions may have placed a far lighter burden on petitioner. Although the jury was told that petitioner had the burden of proof as to its affirmative defenses, the RFOA was not identified as such an affirmative defense (Tr. 2617). In sharp contrast to the treatment of the BFOQ and business necessity defenses, the specific charge on RFOA does not tell the jury that the burden of proof on this defense is on the employer (Tr. 2625, 2626-2627, 2628); see also Tr. 2628-2629.

non-discriminatory reason for its actions.[39] Rather, under Section 4(f)(1), it had to prove that this pattern was attributable to some reasonable factor other than age. Thus, the district court correctly assigned petitioner the burden of proof as to this affirmative defense.[40]

The only evidence petitioner presented to discharge this burden was the arbitration award issued by the System Board of Adjustment. The Board concluded that respondents' downbids had properly been denied under the collective bargaining agreement. This did not establish an RFOA. The Board determined only that there was no specific mechanism in the collective agreement to permit age 60 pilots to downbid. Respondents' claim at trial, however, was that the transfer policies incorporated in the agreement (and otherwise practiced by petitioner) were discriminatory, since they did enable similarly situated younger pilots to downbid when displaced from pilot

[39] Even where a specific statutory defense is not involved, if the plaintiff presents, not merely a minimal prima facie case, but highly probative evidence showing a pattern of discrimination, the employer will risk an adverse decision by the trier of fact if it does not present persuasive evidence that the pattern is really due to a factor other than discrimination. See *Teamsters*, 431 U.S. at 358-360.

[40] Petitioner also objects (Br. 47) to a separate instruction that permitted the jury to analyze this aspect of the case under the disparate impact theory. See *Teamsters*, 431 U.S. at 335-336 n.15. The RFOA defense, however, was raised only in response to respondents' disparate treatment claim. The petition for a writ of certiorari did not seek to raise any issues concerning the alternative disparate impact instruction. We do note, however, that the courts of appeals have applied disparate impact analysis to invalidate practices which, while fair in form, act arbitrarily to deny employment opportunities to older workers. *Leftwich* v. *Harris-Stowe State College*, 702 F.2d 686 (8th Cir. 1983); *Geller* v. *Markham*, 635 F.2d 1027 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981); see also *Monroe* v. *United Air Lines, Inc.*, 736 F.2d 394, 404 n.3 (7th Cir. 1984) petition for cert. pending, No. 84-774; *EEOC* v. *Borden's, Inc.*, 724 F.2d 1390, 1392, 1394 (9th Cir. 1984). This is consistent with the language of the statute and its legislative history. See 29 U.S.C. 621(a)(2); Labor Report 3, 5, 15; *Leg. Hist.* 21, 22, 32.

positions. That a discriminatory policy is enshrined in a collective bargaining agreement is no defense to an ADEA claim. *Levine* v. *Fairleigh Dickinson University*, 646 F.2d 825, 832 (3d Cir. 1981).

Indeed, the Board clearly considered age in its interpretation of the contract, by relying on its conclusion that the parties had not meant to authorize downbidding "for the obvious purposes of evading the application of [the] agreed mandatory retirement plan" (Pet. App. A89). Contract provisions on downbidding that are thus designed or applied to maintain an involuntary retirement policy for employees less than age 70, a policy which is itself unlawful under the ADEA as amended,[41] cannot be a "reasonable factor[] other than age" within the meaning of Section 4(f)(1). Accordingly, the jury properly rejected petitioner's RFOA defense.

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[41] See 29 U.S.C. 623(f)(2): "[N]o * * * seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual [between the ages of 40 and 70] because of the age of such individual * * *."

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JOINT

APPENDIX

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No. 83-1545

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WESTERN AIR LINES, INC.,
Petitioner,

v.

CHARLES G. CRISWELL, ALBERT RON
and RULON H. STARLEY,
Respondents.

WESTERN AIR LINES, INC.,
Petitioner,

v.

WESTCOT B. STONE, III, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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JOINT APPENDIX

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122pp

TABLE OF CONTENTS

	Page
Chronological List Of Relevant Docket Entries	1
1. *Charles G. Criswell, et al. v. Western Air Lines, Inc.*—Docket No. CV-78-2184-AWT	1
2. *Westcot B. Stone, III, et al. v. Western Air Lines, Inc.*—Docket No. CV-81-5521-AWT	35
Findings Of Fact And Conclusions Of Law, Filed July 17, 1978	46
Order, Filed July 17, 1978	49
Jury Instructions, Filed November 13, 1980	51
Memorandum Order On Motion For Clarification, Filed April 26, 1984	67
Excerpts From Agreement Between Western Air Lines, Inc. And The Air Line Pilots In The Service Of Western Air Lines, Inc. As Represented By The Air Line Pilots Association International (Defendant's Exhibit UU, Admitted November 12, 1980, Tr. 2315 D)	71
Excerpts From Agreement Between Western Air Lines, Inc. And The Air Line Pilots In The Service Of Western Air Lines, Inc. As Represented By The Air Line Pilots Association International, September 1, 1977 (Plaintiffs' Exhibit 177)	76
Defendant's Responses To Requests For Admission (Plaintiffs' Exhibit 5)	79
Letter Dated February 13, 1978 From William E. Newell To Albert Ron (Plaintiffs' Exhibit 8)	89
Letter Dated February 13, 1978 From William E. Newell To R. H. Starley (Plaintiffs' Exhibit 14)	91
Appendix "A" (Listing Instances In Which Western Pilots Worked In The Position Of First Officer After Having Worked As Captain, Or Worked In The Position Of Second Officer After Having Worked As Captain Or First Officer) (Plaintiffs' Exhibit 28)	93

TABLE OF CONTENTS—Continued

Page

Accidents Attributed To Pilot-In-Command In Air Carrier Operations, 1973 Through 1978 (Plaintiffs' Exhibit 155) 115

Accidents/Incidents Involving Pilot In Command, Co-Pilot Incapacitation As A Cause/Factor, U.S. Air Carriers, 1962 Through 1977 (Plaintiffs' Exhibit 159) 116

Reported Air Carrier Inflight Illnesses And Deaths Of Flight Deck Crewmembers, 1971-1975 (Plaintiffs' Exhibit 160a) 117

Median Age Of ALPA Captains On U.S. Trunk Carriers By Type Of Equipment, 1978 (Plaintiffs' Exhibit 163) 118

Number Of Accidents Observed ÷ Number Of Accidents Expected By Age Groups—1977/1978 General Aviation Involving Pilots In Command With Commercial And Air Transport Certificates (Plaintiffs' Exhibit 164) 119

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

1. *Charles G. Criswell, et. al. v. Western Air Lines, Inc.*—Docket No. 78-2184—AWT.

DATE	NR.	PROCEEDINGS
6/6/78	sam	1. Fld complt. W/DEMAND FOR JURY TRIAL. Issd summs.
		2. Fld req & ORD for serv of process by other than the USM naming Raymond Fay. Case ref to Mag Geffen.
6/9/78	rlb	3. Fld pltfs' memo of P/As in suppt Of mot for prlm inj.
6/9/78	dg	4. Fld pltf's mtn for preliminary injunction
6/9/78	dg	5. Fld pltf's notc of mtn and mtn for preliminary injunction pursuant to Fed Rule Civ. P. 65 retnble 6-26-78, 10:00 A.M.
6/9/78	dg	6. Fld plts appl for Raymond C. Fay to appear & participate Pro Hac Vice on behalf of pltfs.
6/9/78	dg	7. Fld rtn of sms, servd Gerald P. O'Grady on 6-8-78
6/19/78	dg	8. Fld dfts oppos to mtn for prelim inj; memo & affids
6/21/78	dg	9. Fld pltfs reply to oppos to mtn for prelim inj
6/28/78	aj	10. Fld deft ANSWER to complt.
6/26/78	dg	11. MIN ORD: pltfs mtn for prelim inj. mtn grnted as to pltfs Ron & mtn is denied as to pltfs Starley & Criswell

DATE	NR.	PROCEEDINGS
7/3/78	dg	LODGED pltfs proposed findings of fact & concl of law
	dg	LODGED pltfs proposed ord
7/11/78	dg	12. Fld dfts obj. to proposed findgs of fact, concl of law & ord re mot for prelim inj
	dg	LODGED dfts proposed counter findgs of fact & concl of law re mot for prelim inj
7/17/78	dg	13. Fld Findings of fact & concl of law
	dg	14. Fld ORD re mot for prelim inj is Denied. defts is enjoined from prohibiting the cont employment of pltf Albert Ron beyond his 60th birthday, cont employmnt is w/o interruptn or loss of seniority or employmnt benefits (Ent 7-21-78) mld cpy to prtys, notifi prtys
8/3/78	dg	15. Fld pltfs notc of ruling re pltfs mot for prelim inj
9/7/78	dg	16. Fld pltfs proof of serv
	dg	17. Fld pltfs proof of serv
9/21/78	rlb	18. Fld ORD re early meeting; Mandatory Stat conf set for 12/11/78 at 10am.
9/27/78	rlb	19. Fld stip & ORD ext defts ti to rsp to interrogs to 10/9/78.
10/17/78	rlb	20. Fld deft's status report.
		21. Fld stip & ORD ext ti to 10/25/78 for pltf to rsp to interrogs
12/11/78	rlb	22. MIN ORD: Mandatory Stat Conf hld: Xmots for S/J to be fld by 12/29/78 w/opp due by 1/5/79 & reply by 1/9/79, mot to be hrd 1/15/79, 10am: Crt Grants deft lv to file amnd answ.; Dscvry cut off dt at 3/10/79; PTC set for 4/23/79 at 10am.

DATE	NR.	PROCEEDINGS
12/12/78	rlb	23. Fld Crt's ntc of PTC, rtnble 4/23/79, 10am & addtnl requirements.
		24. Fld Crt's ntc of establishing 3/10/79 as dsc-ry cut off dt.
1/2/79	rlb	25. Fld 1st AMENDED ANSWER.
		26. Fld stip & ORD permitting filing of 1st A/C.
1/2/79	rlb	27. Fld stip & ORD thereon ext hrng on mot for S/J to 2/26/79.
		28. Fld app for & ORD sub Fred T. Ragsdale in place & stead of Joan Celia Lavine as local cnsl for plfs.
2/1/79	rlb	29. Fld & ORD ext ti to 3/5/79 for hrng On mots & S/J.
2/9/79	jcd	30. Fld pltfs' Notc of motn and motn for S/J in favor of pltfs; retbl 3/5/79, 10AM
		31. Fld pltf's affids in support of pltf's motn for S/J.
		32. Fld pltf's memo of P/A in support of motn for S/J.
		33. Fld pltf's exhbts in Support of motn for S/J. LODGED prop findgs of fact, conclsns of law and ord on motn for S/J. LODGED prop judgmnt on motn for S/J.
2/12/79	rlb	34. Fld deft's ntc of mot & Mot, rtnble 3/5/79, 10am. for prtl S/J.
		35. Fld deft's memo of P/As in suppt of deft's mot for S/J.

DATE	NR.		PROCEEDINGS
		36.	Fld deft's affds in suppt deft's Mot for S/J.
2/13/79	rlb	37.	Fld deft's app for lv to file Mot for S/J Ord apprvng.
2/21/79	rlb	38.	Fld stip & ORD ext to 3/12/79 for hrng on S/J.
2/26/79	rlb	39.	Fld deft's opp to plfs' mot for S/J, memo & affd.
		40.	Fld plfs' memo of P/As in opp to deft's mot for S/J.
3/5/79	rlb	41.	Fld plfs' reply to opp to plfs' mot for S/J.
3/6/79	rlb	42.	Fld deft's stmt of genuine issue of fact re trial.
3/12/79	rlb	43.	MIN ORD: X-mots for S/J: MOTs tkn under submission.
3/20/79	rlb	44.	Fld plfs' ntc of mot, rtnble 4/23/79, 10am, for ord cmplng dscvry.
		45.	Fld plfs' memo of P/As in support Mot for ord cmplng dscvry.
		46.	Fld affd on Raymond C. Fay.
		47.	Fld Crt's ORD re opposed mots & objs invl dscvry.
3/29/79	rlb	48.	Fld stip & ORD ext ext schedule for deft's opp to plfs' reply, etc.
4/2/79	rlb	49.	Fld deft's memo in opp to plfs mot for ord compelling dscvry.
4/10/79	lf	50.	Fld pltf's reply to oppos to pltf's motn for ord compelling discovery.
4/17/79	rlb	51.	Fld stip & ORD ext PTC & hrng On mot to compel to 5/14/79.

DATE	NR.		PROCEEDINGS
4/25/79	rlb	52.	Fld finds of fact & concl of law by crt.
5/9/79	rlb	53.	Fld stip & ORD contg PTC & hrg on plf's Mot for ord cmpling to 6/11/79.
5/25/79	rlb	54.	Fld plfs' ntc of mot, rtnble 6/11/79, 10am, for reconsideration.
		55.	Fld plfs' memo of contentions of fact & Law.
		56.	Fld plfs' memo of P/As in suppt mot for reconsid.
6/4/79	rlb	57.	Fld deft's opp to plfs' mt for reconsid of ord grtng prtl S/J—
6/5/79	rlb	58.	Fld stip re plfs' mot for ord cmplg dscvry.
6/6/79	rlb	59.	Fld deft's memo of contentions of fact & law.
6/7/79	rlb	60.	Fld plfs' reply to opp to plfs' mot for reconsid.
		61.	Fld deft's ntc of Mot & mot, rtnble 6/11/79, 10am for cont of PTC; memo & affd of Giammini.
6/8/79	rlb	62.	Fld plfs' ntc of mot, rtnble 6/11/79, for relief from cert argmnts for PTC ord or in alt for postment Of PTC.
		63.	Fld plfs' memo in suppt mot for relief frm cert rqrmnts for PTC, etc.
6/11/79	dz	64.	MIN ORD: ORD motn to compel discvy; for reconsideratn & to cont P/T tkn under submsan.
6/14/79	dz	65.	ORD grntg motn to compel dscvy except at to reqst for expenses. Deft to comply & fl ans to interrogs 7-16-79. Motn

DATE	NR.	PROCEEDINGS
		for reconsideratn to remain under submssn ORD P/T cont to 10-1-79, 10am.
7/27/79	cm	66. Fld pltf's memo re significance of dft's fur interrogs ans.
8/3/79	rlb	67. Fld Amicus Curiae's ntc of mot & mot, rtnble 8/20/79, 10am, to file memo in suppt plfs' mot for reconsid.
		68. Fld Amicus Curiae's mot of EEOC for lv to file as Amicus Curiae's memo in suppt plfs' mot for reconsid.
		69. Fld memo of EEOC as Amicus Curiae in suppt plf's mot for reconsid.
		LODGED proposed ord.
7/31/79	nnm	70. Fld pltf's memo of points and authorities in support of motion for order imposi sanctions under Fed. R. Civ. P. 37 (b)
	rlb	71. Fld plfs' ntc of mot & mot, rtnble 10/1/79, 10am, for ord imposing sanctions.
		72. Fld erratum to plfs' memo re significance of deft's fur interrogs answs.
8/1/79	rlb	73. MIN ORD: ORD advancing hrg on, pt fpr prd imposing sanctions to 8/20/79 at 10am.
8/6/79	rlb	74. Fld plfs' rsp to mot of EEOC to file a memo Amicus Curiae.
8/10/79	rlb	75. Fld deft's 2nd suppl rsps to plfs' interrogs.
		76. Fld deft's rsps to plfs' interrogs, 2nd set.
		77. Fld deft's suppl rsps to plfs' interrogs.

DATE	NR.	PROCEEDINGS
		78. Fld deft's rsps to plfs' interrogs.
8/13/79	nnm	79. Fld deft Western Air Lines, Inc. deft's Supplemental Memo and Affidavits in opposition to pltf's Motion for reconsideration of order granting partial summary Judgment
		80. Fld deft's Memo in opposition to pltf's Motion for order
		81. Fld deft Western Air Lines, Inc. deft's Response to Motion of EEOC To File Amicus Curiae Memo
8/17/79	rlb	82. Fld plfs' reply to opp to mot for ord impos-ing sanctions.
8/20/79	cm	83. MIN ORD: Cnsl present & mtns argud. EEOC's mtn to fle amicus curiae grantd pltf's mtn fr sanctns cont retnble 91/7/79, 10M.
8/25/79	ejb	RECEIVED BEFORE THE JUDICIAL PANEL ON MDL:
		Motn for an ord purs to 28 USC 1407 transfrg cases to the N/D of Illinois for Coordinated or consolidated P/T Procdgs.
		Brief in suppt of Motn to Transfer cases purs to 28 USC 1407.
		Schedule of actns involved.
		Proof of Service.
8/26/79	db	Fld DEPOSITION of Richard H. Mitchell tkn 8/20/79
8/24/79	kp	84. Fld pltf's Notc of Mot & Mot for Ord reschedulg PTC retnbl 9-17-79, 10AM.
8/31/79	rlb	85. Fld deft's ntc Of filing depos of Richard H. Mitchell.

DATE	NR.	PROCEEDINGS
	86.	Fld deft's suppl memo in opp to plfs' mot for ord imposing sanctions; affd Mitchell.
9/11/79	rlb	87. Fld Crt's amnd finds of fact & concl of law.
	88.	Fld Crt's ORD Granting in part mot for reconsid; mot for sanctions tkn off case PTC set for 12/3/79, 10am.
10/11/79	rf	89. Fld stip & ord regard discov.
11/26/79	rlb	90. Fld stip & ORD re P/T schedule.
1/2/80	cm	91. Fld dft's appl fr ex parte ord shrtng ti fr notc of mtn fr protctve ord.
1/3/80	cm	92. Fld pltf's notc of tkng depos of Siegfried Gerathewohl 1/7/80, 9AM.
	93.	Fld pltf's oppos to mtn fr protctve ord.
	rlb	94. Fld deft's ntc of mot & mot, rtnbl 1/3/80, for prot ord that depos not be tkn; for atty fees; affd Glannini & memo of P/As.
1/4/80	rlb	95. MIN ORD: HRG deft's mot for prot ord: deft W/draws mot; P/T contd to 3/24/80 10am.
*1/3/80	rlb	96. MIN ORD: Hrg deft's ex parte app for ord shrtng ti to hr mot for prot ord: Cntd to 1/4/80, 10am.
1/22/80	rlb	97. Fld stip & ORD re P/T schedule & contg PTC to 3/24/80.
	98.	Fld stip & ORD re mot for prot ord is w/drawn.
1/28/80	yd	Fld DEPOSITION of Stanley R. Mohler, M.D. tkn on 1-9-80

DATE	NR.	PROCEEDINGS
2/7/80	rlb	99. Fld deft's ntc Of tkng depos of Donna Cohen, Ph.D & Robert Bruce, M.D. on 2/21/80.
2/28/80	sb	Fld DEPOSITION of Dr. Douglas E. Busby tkn on 1-10-80.
3/7/80	rlb	100. Fld deft's ntc of mot, rtnbl 3/24/80, 10am, for bifurcation of prcdngs; memo of P/As.
3/10/80	rlb	101. Fld deft's amnd memo of contentions of fact & Law.
3/12/80	rlb	102. Fld Crt's ntc Of pleading schedule in rsp to mot & cntg hrg on mot & PTC 4/7/80, 10am.
3/14/80	rlb	103. Fld plfs' memo Of contentions of fact & law.
3/21/80	rlb	104. Fld opp to mot to bifurcate.
3/25/80	rlb	LODGED plfs' proposed PTC ord.
		105. Fld deft's suppl list of exhbts.
3/26/80	rlb	106. Fld stip & ORD that PTC is rescheduled for 3/31/80, 10am.
		107. Fld deft's reply memo to plf's opp to Mot for bifurcation.
3/31/80	rlb	108. MIN ORD: Hrg deft's mot for bifurcation: PTC: Mot for Bifurcation is DENIED PTC Held: J/T set 10/21/80, 9:30am; mots to be fld in ti for hrg on 10/6/80.
4/2/80	sb	Fld DEPOSITION of Robert A. Bruce tkn on 2-21-80
4/3/80	sb	Fld DEPOSITION of Donna Cohen tkn on 2-21-80.

DATE	NR.	PROCEEDINGS
*4/2/80	rlb	109. Fld plfs' PTC ORD.
4/3/80	yd	110. Fld Stip & ORD cont trial date to 11-4-80, 9:30AM; stat cont to 10-20-80, 2PM
4/7/80	sb	Fld DEPOSITION of Charles G. Criswell tkn on 1-4-80
	rlb	111. Fld plfs' ntc of fing depos of Criswell.
4/16/80	cg	Fld DEPOSITION OF WILLIAM D. BEAL taken on 1-2-80
		Fld DEPOSITION OF BRUCE R. WALLACE taken on 1-2-80
		Fld DEPOSITION OF ROBERT A. MATTEWS taken on 1-2-80
4/11/80	rlb	112. Fld deft's ntc of mot & mot, rtnble 4/28/80, 10am, for protective ord, sanctions & for ord cmplng fur rsps to interrogs; memo & affd.
		113. Fld Ord (G) re pending dscvry mot for 4/28/80.
		114. Fld memofrm Judge Lucas to Mag Geffen re ntc of mot for prot ord, etc for 4/28/80.
4/16/80	jcd	115. Fld deft's Transcript of hrg in suppt of motn for protective ord re depos.
		116. Fld deft's Notc of fig of depos of Bruce R. Wallace and Robert A. Matthews wt corrections and depos of William D. Beal w/o corrections
4/23/80	rlb	117. Fld stip & ORD (G) re deft's mot for prot ord, sanctions & for ord compelling

DATE	NR.	PROCEEDINGS
4/29/80	rlb	118. Fld amnd stip re deft's mot for prot ord, sanctions, ord cmplng rsp & ORD thereon.
6/17/80	sb	Fld DEPOSITION of George Dennis Seavey tkn on 4-1-80
	rlb	119. Fld deft's ntc of fing depos of Seavey w/corrections.
8/1/80	rz	120. Fld ORD (IH) dtd 8/1/80, transfg the action to the cal of Judge Tashima for all fur procdgs. Ptys notified
8/15/80	jr	121. MIN ORD: trial dt advncd to 10/21/80 at 9:30AM; any mots must be fld no latr than 9/15/80 & set for hrg on 10/6/80 at 3:30PM w/ stat conf. opps to be fld by 9/22/80 & rplys by 9/25/80.
9/15/80	rz	122. Fld pltfs notc of mots to exclude fm evidenc arbitration decisions (defts exhs VV WW), medical articles & "Government" docs not w/in F.R.E. 803(8) retnbl 10/6/80, 10AM
	rz	123. Fld pltfs memo in suppt of pltfs mot to exclud fm evidence arbitration decisions (deft's exhs VV, WW)
	rz	124. Fld pltfs memo in suppt of mot to exclud fm evidenc "govt" docs not w/in F.R.E. 803(8)
9/17/80	rz	125. Fld deft notc of & mot fr ord excludng pltfs exhs & test in limine; aff of Paul L. Giannini; memo retnbl 10/6/80, 3:30PM.
	rz	126. Fld deft memo in suppt of mot to exclud pltfs trial exhs; mot in limine
	rz	127. Fld deft all of Paul L. Giannini

DATE	NR.		PROCEEDINGS
9/19/80	rz	128.	Fld deft notc of & mot fr ord that discov be re-opened fr the tkg of a depos; memo & aff in suppt thereof retnbl 10/6/80, 10AM
	rz	129.	Fld deft aff of Paul L. Giannini in suppt ofmot fr ord that discov be re-opened
9/23/80	rz	130.	Fld pltfs opp to mot to exclud trial exhs
9/24/80	rz	131.	Fld deft memo in opp to mot to exclud fm evidenc medical articles & gov't docs
	rz	132.	Fld deft memo in opp to mot to exclude arbitration decisions
9/25/80	rz	133.	Fld deft reply memo to opp to mot to exclud pltfs' trial exhbs
9/30/80	rz	134.	Fld pltf reply to opp to mot to exclud fm evidenc medical articles
	rz	135.	Fld pltf reply to opp to mot to exclud fm evidenc arbitratn decisions (deft's exhs VV,WW); hrg set fr 10/6/80, 3:30PM)
	rz	136.	Fld pltfs opp to mot fr ord that discov be reopened fr the tkg of a depos
	rz	137.	Fld pltfs reply to opp to mot to exclud fm evidenc "govt" docs not w/in F.R.E. 803(8)
10/1/80	rz	138.	Fld pltf chg of addres of atty Fred T. Ragsdale
10/2/80	rz	139.	Fld deft 2nd aff of Paul L. Giannini in suppt of deft's mot to re-open discov
	rz	140.	Fld deft stip re mot of deft to re-open discov

DATE	NR.		PROCEEDINGS
10/6/80	rz	141.	Fld deft 2nd suppl aff of Paul L. Giannini in suppt of mot to re-open discov
10/7/80	rz	142.	Fld deft notc of & mot fr ord prohibiting cnsl fm further contact w/ deft's managing agents retnbl 10/6/80, 3:30PM
	rz	143.	Fld deft memo in suppt of mot fr protectiv ord
10/6/80	rz	144.	Fld deft stip concerning P/T mots, hrg set fr 10/6/80, 3:30PM
10/9/80	rz	145.	Fld deft aff of Paul L. Gianninni
*10/6/80	rz	146.	MIN ORD: Hrg pltfs mot to exclud fm evidenc arbitration decisions, medical articles & govt docs GRANTED in part & DENIED in part. Defts mots to exclude fm evidence pltf's exhbs & test GRANTED in part & DENIED in part. Crt deferred ruling on some matters. Defts mot to re-open discov ORD DENIED. Matter ORD cont to 10/7/80, 10AM fr furthr arg
10/7/80	rz	147.	MIN ORD: Further hrg on cnsl's mots in limine. Cnsl present furthr args. Crt cont to rule on mots in limine; granting in part & denying in part & deferring to rule on some matters. ORDS matter cont to 10/20/80, 1PM fr a status conf & to hear any othr mots in limine
10/9/80	rz	147.	Fld ORD re trial witns
10/14/80	rz	148.	Fld deft aff of Paul L. Giannini in suppt of mot fr cont; memo
	rz	149.	Fld deft notc of & mot fr cont of trial; & memo retnbl 10/14/80, 1:30PM

DATE	NR.		PROCEEDINGS
	rz	150.	Fld stip & ORD tht deft mot fr cont of trial shall be hrd 10/14/80, 1:30PM & pltfs waive furthr notc of this mot & the normal 17 days notc
	rz	151.	MIN ORD: Conf in chambers. Hrg held on defts mot to cont trial date & ORD mot DENIED. Deft reqs a reconsideratn: DENIED. Crt. extends ti to fi the proposed jury instructions, voir dire questns & update of exhs until 10/20/80
10/15/80	rz	152.	Fld deft objs to notc of tkg depos
*10/9/80	rz	153.	MIN ORD: Conf in chambers. Crt & cnsl confer re the status of a prospectiv witns
10/15/80	rz	154.	Fld pltfs notc of depos of Joseph Bryner on 10/17/80 & William A. Gill, Jr. on 10/17/80
10/16/80	rz	155.	Fld pltfs notc of depos (dup) of Joseph Bryner & William A. Gill, Jr. on 10/17/80
10/17/80	rz	156.	Fld pltfs notc of depos of Seth M. Oberg, Jr. on 10/20/80
	rz	157.	Fld pltfs notc of filing of pltfs proposd jury instructions on 10/17/80
	rz	158.	Fld pltfs notc of filing of questions submitted for voir dire on 10/17/80
	rz	159.	Fld pltfs notc of filing of experts exh lists
	rz	160.	Fld deft's proposed case description & voir dire
10/20/80	rz	161.	Fld deft notc of assoc of cnsl fr deft

DATE	NR.		PROCEEDINGS
*10/17/80	rz	162.	Recvd fm 9CCA cpy of ord that petn fr writ of mandamus DENIED
10/20/80	rz	163.	Fld deft list of exhs to be used on direct exam & fr impeachment by deft
	rz	164.	Fld deft notc of filing of deft's partial proposd jury instructns & objs to pltf's previously filed proposd instructns
	rz	165.	Fld pltf applic & ORD allowing Alan M. Serwer to appear as non-resident atty design Fred T. Ragsdale as local cnsl
10/21/80	rz	166.	Fld deft notc of mot & mot fr dism & nonsuit by deft
10/20/80	rlb	167.	MIN ORD: Stat Conf Hld: Plf's rqst to tk depos of Capt. Oberg on 10/20/80 in Denied; Plf's mot to bifurcate trial ORD Denied; Crt Ords cnsl to file suppl jury instructions by 10/30/80.
10/21/80	rlb	168.	MIN ORD: J/T 1st dy: Jury imp & swn; Deft mvs to dsm or in alt for non-suit, Denied: ORD trial cntd to 10/22/80, 9:15am.
		169.	Fld plfs' ntc of fing depos of Joseph Bryner, Joseph V. Manning & William A. Gill, Jr.
		170.	Fld ORD frm USCCA that ptn for writ of mandamus is Denied.
10/22/80	rlb	171.	Fld plfs' ntc of fing depos of Donald O. Lundberg.
10/23/80	rlb	172.	Fld deft's ntc of fing depos of Robert V. Johnson w/changes
		173.	Fld deft's ntc of fing changes of depos of Robert V. Johnson & William E. Newell.

DATE	NR.		PROCEEDINGS
10/28/80	rlb	174.	Fld deft's objs to subp to prod docs.
10/22/80	rlb	175.	MIN ORD: J/T 2nd dy: Sw wits Mkd exhbts, Cont to 10/23/80, 9:30am.
*10/23/80	rlb	176.	MIN ORD: J/T 3rd dy: Sw wits & mkd exhbts; cntd to 10/24/80, 9:30am
*10/24/80	rlb	177.	MIN ORD: J/T 4th dy: Sw wits & mkd exhbts; cntd to 10/28/80, 9:30am
*10/28/80	rlb	178.	MIN ORD: J/T 5th dy: Sw wits & mkd exhbts; cntd to 10/29/80, 9:30am
10/29/80	rlb	179.	MIN ORD: J/T 6th dy: Sw wits & Mkd exhbts; cntd to 10/30/80, 9:15am
10/30/80	rlb	180.	MIN ORD: J/T 7th dy: Sw wits & mkd exhbs: Deft's rqst to tk jury to Western Airlines for simulator demo, DENIED: Deft mks Rule 50(A) mot; Ord Jury excused until 11/4/80, 9:30a; Crt Ords cnsl to rtn 11/3/80, 4pm hrg on rule 50(A) mot.
11/3/80	rlb	181.	Fld deft's ntc of mot & mot 11/3/80 to strk cert evid; memo of P/As.
		182.	Fld deft's ntc of mot & mot 11/3/80 for directed verdict; memo of P/As.
11/5/80	rlb	183.	Fld deft's rqst for interrogs to jury.
		184.	Fld deft's ntc of suppl rqst for jury instructions.
*11/4/80	rlb	185.	MIN ORD: J/T 8th dy: Sw wits & Mkd exhbts Plf's mot to strk Granted in part & Denied in part; Plf's mot for ord prohibiting deft frm calling cert wits Granted in part & Denied in part: Cntd to 11/5/80, 9:30am.
*11/3/80	rlb	186.	MIN ORD: Hrg deft;s rule 50(a) mot & mot to strk cert evidence: Mot DENIED.

DATE	NR.		PROCEEDINGS
*11/5/80	rlb	187.	Fld pltfs' etc of fing revised proposed jury instructions.
		188.	Fld plfs' comments on Crt's instructions.
11/5/80	rlb	189.	MIN ORD: J/T 9th dy: Sw wits & Mkd exhbs; Cntd to 11/6/80, 9:30am.
11/6/80	rlb	190.	MIN ORD: J/T 10th dy: Sw wits & Mkd exhbs; cntd to 11/7/80, 9:30am.
11/7/80	rlb	191.	MIN ORD: J/T 11th dy: Sw wits & Mkd exhbs; Cntd to 11/10/80, 1pm.
11/10/80	rlb	192.	Fld deft's objs to plfs' revised proposed jury instructions
11/12/80	rlb	193.	MIN ORD: J/T 13th dy: Sw wits & mkd exhbts; Cntd to 11/13/80 9am.
		194.	Fld plfs' ntc of fling revised verdict form & special interrogs to accompany general verdict.
		195.	Fld ntc of fing plfs' objs to jury instructions.
11/13/80	rlb	196.	MIN ORD: J/T 14th dy: Plf & deft pres clsng argmnts; Crt inst jury; Alt jurs 1-4 exsd; Bailiff & matron swn; Fld Jury note #1; Cntd to 11/14/80, 9am.
11/14/80	rlb	197.	MIN ORD: J/T 15th dy: Fld jury note #2 & 3; Fld verdicts in fv plfs & agnst deft. Crt to review issue of equitbl relief & shall inform cnsl if fur briefing req; Plf's oral mot for prel inj & that plfs Starley & Criswell be reinstated Ord Denied.
*10/21/80	rlb		Fld DEPOSITIONS of Joseph Vincent Manning, tkn 10/20/80.

DATE	NR.	PROCEEDINGS
*10/23/80	rlb	Fld DEPOSITIONS of Robert V. Johnson, tkng 1/3/80.
		Fld DEPOSITIONS of William E. Newell, tkn 4/1/80.
*11/7/80	rlb	Fld DEPOSITIONS of William E. Newell, tkn 4/1/80.
*11/14/80	rlb	Fld DEPOSITIONS of Donald O. Lundberg, tkn 10/7/80.
11/26/80	rlb	198. MIN ORD: Crt & cnsl confer; Hrg on equitable issues set for 12/11/80, 9am; ea side file & srv suppl memo of contentions of fact & law by 12/5/80.
12/5/80	rlb	199. Fld deft's list of exhbts & wits.
		200. Fld deft's memo of contentions of fact & law in opp to plfs' demand for reinstatement & other equitable relief.
		201. Fld plfs' suppl memo of contentions of fact & law.
12/9/80	rlb	202. Fld Western's table of authorities for memo of contnetions of fact & law.
12/10/80	rlb	203. Fld plfs' rsp to deft's suppl memo of contentions of fact & law.
		204. Fld deft's reply memo in opp to plf's proposed inj relief.
12/11/80	rlb	205. MIN ORD: C/T 1st dy: Hrg on equitbl issues: Sw wits; Crt instrcts plf to fil & srv prop fnds & prop jdgmt nlt 1/21/81 & deft gvn to 1/26/81 to file cntr finds & objs: Plf to fl mot for prlm inj nlt 1/12/81 & set for hrg 2/2/81, 9:30am. Fld exhb & witn list.
1/8/81	rlb	206. Fld stip & ORD ext ti to 2/10/81 for plfs' ti file proposed finds of fact,

DATE	NR.	PROCEEDINGS
		concls of law & inj; deft's rsp to 2/24/81,; hrg 3/6/81.
2/11/81	lp	LODGED pltf proposed findings of fact & conclusns of law.
2/11/81	lp	207. Fld pltf erratrum, hrng set for 3/6/81 at 3pm.
		LODGED pltf porposed ord & inc.
2/13/81	lp	208. Fld pltf notc of pltf's renewed mot for a prel inj.
		209. Fld pltfs memo in supprt of pltfs' renewed mot for a prel inj.
		LODGED pltf proposed findings of fact & conclusns of law, ord & Prel Inj.
2/17/81	lp	210. Fld deft notc of & mot for cont of hrng on pltfs' applic for equitable relief; extensn of tim to fil objectns & proposed counter-findings & conclusions; memo & affid.
2/25/81	lp	211. Fld deft memo in opposition to pltfs' renewed mot for a prel inj, retrnbl On 3/6/81 at 3pm.
		212. Fld deft memo in opposition to pltfs' mot for a permanent inj of reinstatemnt & other equitable relief.
2/26/81	yd	213. Fld ptlfs reply to opp to pltfs renewed motn for prelim injuntn
	yd	LODGED pltfs prop addendum to pltfs' prop findngs of fact & conclus of law
3/6/81	lb	214. MIN ORD: Crt hears argumnts fr cnsl. grnts deft until 3/13/81 to fil additional brief limited to discussion of Kelly vs. American Standard. At that tim mat of equitable relief & mot

DATE	NR.		PROCEEDINGS
			for prel inj will stand submitted. Sh the deft fil its brief earlier than 3/13/81, mat will stand submitted as of the date the brief is fld.
3/13/81	lp	215.	Fld deft's rebuttal memo on Kelly vs. American-Standard.
5/12/81	lp	216.	Fld final judgmnt & Permanent Injunction & ORD that pltf Criswell, jury verdict for Criswell & against deft Western Air Lines, Inc. in amt of $50,393.87. This verdict covers the 28 month period fr August 1978 to November 1980. Criswell is awarded additional liquidated damages in a lik amt of $50,393.87. Criswell is fur awarded lost wages of $5,116.41 per month for the six-month period fr verdict of judgmnt or $30,698.46. Total for Criswell is $30,486.20. Pltf Starley, Actual pre-verdict damges, $52,088.94, Liquidated damages $52,-088.94 & Actual post-verdict damages $30,698.46, Total for Starley $134,-876.34. Pltf Ron, is amt of $5,000. Because Ron has cont workng purs to a prel inj, no damage adjustmnt is necessary, however awarded additional liquidated damages in a lik amt. total favor of Ron is $10,000.00. pltfs Criswell & Starley sh immed be reinstated by Western as stated w/in ORD. Pltf Ron sh be cont in his employmnt by Western as a DC-10 2nd officer. Western, its officers, etc., are permanently enjoined fr refusng or failing to permit its flights deck crew members to work or cont to work as second officer after age 60 for any reasons

DATE	NR.		PROCEEDINGS
			based on age, etc. as state w/in ORD. Pltfs are awarded reasonable attys' fees, the amt of such award to be determined by an ord after judgmnt, as provided in the memo opinion fld concurrently. pltfs sh recover of deft their costs of suit. (ENT 5/13/81) Mld cpys. Mld ntc ptys. MD JS-6.
		217.	Fld Memorandum opinion. (ENT 5/13/81) Mld cpys. Mld notc ptys.
5/13/81	lp	218.	Fld Correction of final judgmnt & of Memorandum Opinion & ORD that the amt of $50,393.87 appearing on pag 1 at line 27 & pag 2 at lines 1, 6, 6.5 & 9 is cirrected to read $60,393.87. Tht total amt of money judgmnt in favor of pltf Criswell on pg 2 at lin 7 is corrected by deleting "$131,468.20" & substituting amt of $151,468.20". Memo Opinion, fld on 5/12/81 is corrected by deleting the 1st figure "5" wh appears on pag 2 at line 8 as a part of amt of "$50,393.87 & substituting therefore the figure "6". (ENT 5/14/81) Mld cpys. Mld notc ptys.
12/5/80	lp	219.	Fld reporter's transcript of procedngs as of 10/20/80.
12/5/80	lp	220.	Fld reporter's transcript of procedngs as of 10/21/80.
5/22/81	lp	221.	Fld deft notc of & mot for new tri and/or modifictn of findings & judgmnt; for judgmnt notwithstanding the verdict & S/J, retrnbl on 6/15/81 at 10am.
		222.	Fld deft's mot for judgmnt notwithstanding the verdict & for S/J; memo of P/A.

DATE	NR.	PROCEEDINGS
		LODGED deft's porposed findings of fact, concl of law, & ord re S/J.
		LODGED deft proposed judgmnt on mot for S/J.
		223. Fld deft's mot for a new tri and/or a modifictn of findgs & judgmnt; memo of P/A.
		224. Fld deft notc of & mot for modifictn & clarifictn of final judgmnt & permanent inj.
		225. Fld deft memo of deft in supprt of mot for modifictn & clarifictn of final judgmnt & permanent inj.
		226. Fld deft appendices in supprt of deft's mot for judgment notwithstanding the verdict therein for S/J.
		227. Fld deft affid of H.L. Reighard, Fed Air Surgeion, in supprt of deft's mot for new tri, retrnbl on 6/15/81 at 10am.
11/13/80	lp	228. Fld jury instructns settlmnt at informla conf.
	lp	229. Fld jury instructn given.
11/14/80	lp	230. Fld jury instructns givn (Supplemental)
11/14/80	lp	231. Fld special interrogatory.
11/14/80	lp	232. Fld verdict in favor of pltf Charles G. Criswell & against deft Western Air Lines Inc & assess him damages in sum of $60,393.87.
		233. Fld verdict in favor of pltf Rulon H. Starley, & against deft Western Air Lines, Inc & assess him damages in sum of $52,088.94.

DATE	NR.	PROCEEDINGS
		234. Fld verdict in favor of pltf Albert Ron & against deft Western Air Lines, Inc. & assess him damages in sum of $5,000.00.
12/11/80	lp	235. Fld deft's list of exhbts.
		236. Fld list of pltfs' exhbts & pltfs' exhbts for cross-exam.
5/22/81	lp	237. Fld Stip & ORD that Western's notc of takng depositns dated 5/15/81 is vacated & cancelled, any post-tri mots brought by Western will be notced for hrng on 6/15/81. Prior to the hrng on the post-tri motns, Western will not mov to stay any portion of judgmnt & inj not stayed by this stip & Ord.
5/26/81	lp	238. Fld deft notc of & mot for temporary stay of judgmnt & permanent inj, memo, retrnbl on 6/15/81 at 10am.
6/1/81	lp	239. Fld deft erratum, retnbl on 6/15/81 at 10am.
6/4/81	rt	240. Fld pltf's opp to Western's Post-Trial mot's, retnbl 6/15/81 at 10am.
		241. Fld pltf's opp to Western-s Post-Trial mot's, retnbl 6/15/81 at 10am.
6/3/81	lp	242. Fld pltfs statmnt of genuine issues.
6/4/81	lp	243. Fld pltf notc of chang of address.
6/8/81	sb	244. Fld pltf's notc of motn under Fed R.C.P. (60(a) retble 7-6-81 10am
		245. Fld pltf's memo -in suppt of pltf motn under Fed R. C.P. 60(a)
6/9/81	rlb	246. Fld deft's reply memo in suppt its mot for new trial.

DATE	NR.		PROCEEDINGS
		247.	Fld deft's reply memo in suppt mot for mod & clarification of fnl judgmt & perm inj ; affd Giannini.
		248.	Fld deft's reply memo in suppts its mot for judgmt, etc.
6/15/81	am	249.	Fld deft's NOTC OF APPEAL to 9th Cir. C/A frm Judgmt ent 5/13/81. $70.00 fing & docket fees pd.
10/23/80	rlb	250.	Fld Reporter's Transcript of prcdngs of 10/22/80.
10/28/80	rlb	251.	Fld Reporter's Transcript of prcdngs of 10/24/80.
10/29/80	rlb	252.	Fld Reporter's Transcript of prcdngs of 10/28/80.
10/30/80	rlb	253.	Fld reporter's Transcript of prcdngs of 10/29/80.
*11/3/80	rlb	254.	Fld Reporter's Transcript of prcdngs 10/30/80.
		255.	Fld Reporter's Transcript of prcdngs, (excerpt) of 10/21/80.
		256.	Fld Reporter's Transcript of prcdngs, (excerpt) of 10/21/80.
*11/4/80	rlb	257.	Fld Reporter's Transcript of prcdngs, of 11/3/80
*11/6/80	rlb	258.	Fld reporter's Transcript of prcdngs of 11/4/80.
		259.	Fld Reporter's Transcript of prcdngs of 11/5/80
*11/7/80	rlb	260.	Fld Reporter's Transcript of prcdngs of 11/6/80
*11/10/80	rlb	261.	Fld Reporter's Transcript of prcdngs of 11/7/80.

DATE	NR.		PROCEEDINGS
*11/12/80	rlb	262.	Fld Reporter's Transcript of prcdngs of 11/10/80
*11/13/80	rlb	263.	Fld Reporter's Transcript of prcdngs of 11/12/80.
*11/14/80	rlb	264.	Fld Reporter's Transcript of prcdngs of 11/14/80
*11/20/80	rlb	265.	Fdl reporter's Transcript of prcdngs of 11/14/80.
*12/1/80	rlb	266.	Fld Reporter's Transcript of prcdngs of 11/26/80
*12/15/80	rlb	267.	Fld Reporter's Transcript of prcdngs of 12/11/80
*3/9/81	rlb	268.	Fld Reporter's Transcript of prcdngs of 3/6/81
6/18/81	rlb	269.	Fld Reporter's Transcript of prcdngs of 10/6/80
		270.	Fld Reporter's Transcript of prcdngs of 10/7/80
		271.	Fld Reporter's Transcript of prcdngs of 10/7/80 (Excerpt)
		272.	Fld Reporter's Transcript of prcdngs of 10/14/80
		273.	Fld Reporter's Transcript of prcdngs of 10/23/80
		274.	Fld Reporter's Transcript of prcdngs of 6/15/81
		275.	Fld Reporter's Transcript of prcdngs of 6/16/81
*4/14/81		276.	Fld Reporter's Transcript of prcdngs of 10/22/80.
6/11/81	jcd	277.	Fld deft's memo in oppos to pltfs' motn to amnd judgmnt under FRCP 60(a).

DATE	NR.		PROCEEDINGS
*6/8/81	jcd	278.	Fld deft's Notc of motn for ord approving Supersedeas Bond, retbl 6/15/81 10a.m. wt memo.
6/10/81	jcd	279.	Fld Stip and ORD that pltf's applic for attys' fees and costs may be fld on or bef 6/19/81.
6/17/81	kt	280.	Fld ORD that portn of final jdmt ent on 5-13-81 (corrected 5-14-81) are stayed pendg appeal, as follows: pymt of all money damages under Part A conditioned upon submissn by deft of supersedeas bond in proper form, & Part B, ¶s 1(e), 3(a), 3(b), 4 & 5; fur ORD that entire final jdmt & perm injunc is stayed for 20 days, thru 6-6-81 at 5pm pacific daylight time, except for ¶s of Part B: 1(a), 1(c), 1(d) & 2 (ENT 6-19-81) mld cys & ntc
6/19/81	am	281.	Fld deft's AMENDED NOTC OF APPEAL to 9th Cir C/A frm Judgmt ent 6/19/81 & Ord ent 6/19/81.
*6/17/81	rhm	282.	Fld ORD (AWT) Western's Motns for New Trial/Modification of Fndgs & Jdgmnt; for Jdgmnt Notwithstanding the Verdict & for Summary Jdgmnt; for Modification & Clarification of Final Jdgmnt & Perm Inj DENIED. Purs stip & ord of 5/22/81 certain portions of Final Jdgmnt & Perm Inj Stayed to 6/16/81. Western's Supersedeas bond in amt of $850,000 apprvd. Pltf's motn under FRCivP 60(a) denied.
*6/16/81	rhm	283.	MIN ORD: Hrg defts motn for stay pending appeal: ORD deft to file supersedeas bond nlt 6/19/81. Crt apprvs

DATE	NR.		PROCEEDINGS
			bond & inst cnsl to present bond to Clerk for approval. Court stays portion of perm inj pending outcome of appeal. ORD temp stay of remaining portions of pem inj w/exceptions of para 1a, 1c & 1d. Deft to prep formal ord & have approved by pltfs cnsl. Time ext to 6/29/81 for file applications for atty fees & costs. Deft to fi resp to app for atty fees, etc. nlt 7/13/81.
*6/15/81	rhm	284.	MIN ORD: Hrg defts motns for new trial /modification of fndgs & jdgmnt; jdgmnt notwithstanding the verdict & S/J; for approval of supercedeas bond for temp stay of jdgmnt & perm inj and pltfs motn purs FRCivP 68(a): ORD defts motns for new trial/modification of fndgs & jdgmnt; for jdgmnt notwithstanding verdict & for S/J DENIED. Fur ORD pltf motn purs FRCivP DENIED. Deft to fi motn for stay pend appeal of jdgmnt & perm inj this date Hrg on motn for stay set 6/16/81, 9:15 a.m. ORD ord of 5/22/81 partially staying perm inj remain in effect until determination of deft motn for per stay. Crt approves bond for presentation to Clerk. Pltf to prep formal ord
6/11/81	jcd	285.	Fld ORDER ext'g ti to Atty Joan Celia Lavine to 6/19/81 to fi an applic for attys' fees. This applic shall be servd on all cnsl of rec.
		286.	Fld declartn of Joan Celia Lavine, orig local cnsl of pltfs of rec in suppt of ex parte applic to file motn for attys'

DATE	NR.		PROCEEDINGS
			fees and costs and expenses memo of p/a.
6/15/81	sb	287.	Fld deft's notc of motn for stay pending appeal of judg & permanent inj memo
6/22/81	jcd	288.	Fld deft's certification and ORD in accordance wt LR for flg of bond on Appea
		289.	Fld Undertkng Bond for Appeal in the amnt of $850,000. frm The Travelers Indemnity Co. Bond #227F3265.
6/25/81	sb	290.	Fld designation og portion of transc to be include by appellant in record on appeal
6/29/81	sb	291.	Fld notc of motn & motn & decla of Joan Celia Lavine in suppt of motn fr att fee & cost; memo of P/A in suppt retble 8-3-81 10am
		292.	Fld aff of Fred T Ragsdale in suppt of pltf petn fr atty fees & Bill of Cost
		293.	Fld memo in suppt of pltf petn fr atty fees
		293.	Fld memo in support of pltf Bill of Cost
		295.	Fld pltf petn fr atty fee & Bill of Cost.
6/30/81	sb	296.	Fld notc of filing Soloon in suppt of pltf petn fr atty fees
7/6/81	am	297.	Fld pltf's NOTC OF X-APPEAL to 9th Cir C/A frm judgmt ent 5/13/81, corrected 5/14/81.
7/13/81	yd	298.	Fld deft's notc of motn & motn for additional disc pertaining to award of atty's fees retnbl 8-3-81, 10AM; supptng memo

DATE	NR.		PROCEEDINGS
	yd	299.	Fld deft's suppl opp to motn of Joan Celia Lavine for attys fees
7/14/81	sb	300.	Fld designation of portion of transc to be included by cross-appellant in record on appeal
7/13/81	sb	301.	Fld deft's resp to petn of pltf & motn of Joan Celia Lavine fr atty DEMAND FR JURY TRIAL: Supporting memo
7/20/81	sb	302.	Fld reply of atty Joan Lavine to Western opp to hr applic fee & motn fr lv to do dics by deft's
7/21/81	sb	303.	Fld opp to motn fr dic & trial on pltf petn fr atty fee's
8/17/31	sb		LODGED ORD
8/27/81	ag		LODGED pltf prop protective ord purs to Crt's ord, fld 8-17-81
8/28/81	sb		LODGED amended prop protective ord pur to crt ord fld 8-17-81
*8/24/81	sb	304.	Fld deft's proof of serv
*8/12/81	mm	305.	Fld pltf's Suppl to Notc of hrg on motn concerning atty's fees & costs.
		306.	Fld pltf's Obj to proposed ord prepared by Haley, Bader & Potts re atty's fees applications.
		307.	Fld deft's oppo to motn for reconsideration by Joan Celia Lavine.
		308.	Fld pltf's proof of personal servc on notc of motn & motn for orders striking Lavine removal as counsel of record for purposes of making fee & costs app & reconsideration of its ord concerning atty-client relations; Memo of P&A; Decl of Joan C. Lavine, on 8-10-81.

DATE	NR.		PROCEEDINGS
*8/10/81	mm	309.	Fld pltf's notc of motn & motn for orders striking Lavine removal as counsel of rec for purposes of making fee & costs app & reconsideration of its orders concerning atty client relations; memo of P&A; decl of Joan C. Lavine.
9/2/81	mm	310.	Fld Atty Lavine's trial brief on standing to file & seek recovery of fees & costs & suppl appl for atty's fees & reimbursement of costs & expenses; aff of Joan Lavine; decl of Milton B. Safier & Gay Kinman; exhibits.
		311.	Fld Atty Lavine's responses to interrogs propounded by deft to non-party, atty Joan Celia Lavine, ordered 8-3-81.
9/3/81	mm	312.	Fld atty Lavine's amended responses to interrogs propounded by deft to non-party, atty Jaon Celia Lavine, per order of 8-3-81.
		313.	Fld pltf's aff of Rosann Gutierrez in support of pltfs' suppl pet for atty's fees & bill of costs.
		314.	Fld pltfs' suppl pet for attys' fees & suppl bill of costs.
9/3/81	mm	315.	Fld pltf's answ to Interrogs by Western Air Lines, Inc. FILED UNDER SEAL.
9/4/81	mm	316.	Fld Joan Celia Lavine's proof of servc of trial brief on atty Lavine's standing to file & seek reco of fees & suppl app for attys fees & reimbursement of costs, on Rae & Gute Darling and Fred Ragsdale, Raymond C. Fay. Response to interrogs propounded by deft West-

DATE	NR.		PROCEEDINGS
			ern Airlines to nonparty Lavine serv on Rae & Gute Darling & Fred Ragsdale.
9/14/81	mm	317.	FLD Deft's reply & requ to pltfs & their attys for additional discov, FILED UNDER SEAL
9/15/81	mm	318.	Fld pltf's notc of lodging info for evaluation of fee & cost appl in camera. LODGED: proposed in camera info re fee.
*8/17/81	mm	319.	Fld ORD (AWT) DENYING & submitting motns of atty Lavine; motn for reconsideration DENIED for failure to comply w/LR 3.16; Hrg notc for motn to strike taken off cal & motn taken under submission at ti matter of attys' fees is submitted: any oppo to strike shall be served and filed w/i 15 days of date hereof, atty Lavine's reply to be servd & filed w/i 10 days thereafter. Pltf's to lodge written ords ord to file at hrg on 8-3-81 w/i 10 days of date hereof; if parties unable to agree on protective ord, ea party who desires to do so shall serve & lodge proposed form of such ord w/i 10 days of date hereof.
*7/31/81	mm	320.	Lodged cc of 9th C/A ord denying appellant's motn for stay pending appeal.
*8/3/81	mm	321.	MIN ORD: Hrg deft's motn for addl discov re attys fees. Motn of Lavine for atty fees. Crt GRANTS Western Airlines limited discov of prop interrogs appended to its motn for addl

DATE	NR.		PROCEEDINGS
			discov. Cnsl for pltf & atty Joan Lavine have 30 days to fi answ & obj w/Crt & 30 days to prod materi' requested. Pltf to prepare a proposed protective ord for Crt approval. Any reply to answ & obj to interrogs to be fi 15 days aft their filing date. Atty Lavine to brief issue of her standing as atty seeking fees & fi a memo w/i 30 days. Deft has 30 days to fi oppo to fee app. Deft's motn for J/T on issue of fees is DENIED. Papers re discov to be filed UNDER SEAL.
10/13/81	ag	322.	Fld deft memo in opp to petitns for award of attys' fees & costs. (UNDER SEAL)
11/3/81	mm	323.	Fld Memo decision & ORD (AWT) re attys fees. (ENT 11-5-81).
11/12/81	mm	324.	Fld atty Lavine's notc of motn & motn for reconsideration by atty Lavine; memo of P&A in supoprt; decl of Joan Celia Lavine. Retnbl 12-7-81 at 10am.
11/6/81	mm	325.	Fld correspondenc to Judge Tashima fr John Kennedy.
11/6/81	mm	326.	Fld correspondence to Judge Tashima fr Raymond C. Fay.
11/16/81	mm	327.	Fld correspondence to Judge Tashima fr Raymond C. Fay.
11/25/81	ew	328.	Fld dft's NOTC OF APPEAL to 9th Cir. C/A frm Memo Decision & Ord re attys fees ent 11-5-81.
12/3/81	ew	329.	Fld non-party dft's NOTC OF APPEAL to 9th Cir. C/A frm Memo Decision & Ord re attys fees ent 11-5-81. $70.00 fldng & Docket fees pd.

DATE	NR.		PROCEEDINGS
12/4/81	mm	330.	Fld deft's descrip of portions of transc to be included by appellant in record on appeal.
12/8/81	mm		LODGED: Prop ord denying petn for reconsideration of award of attys fees by Joan Celia Lavine.
12/7/81	mm	331.	MIN ORD: Hrg motn of atty Lavine for reconsideration of memo decision & ord re atty's fees. Crt ORDS motn by Lavine DENIED. Deft instructed to prepare a formal ord.
12/15/81	mm	332.	Fld ORD (AWT) DENYING pet for recons of award of attys fees by Joan Celia Levine. (ENT 12-16-81) Mld Notcs
12/16/81	mm	333.	Fld transc design form. 9th C/A
12/23/81	mm	334.	Fld transc design & ord form for atty Lavine.
12/28/81	mm	335.	Fld design of portions of tranx to be included by x-appellants in record on appeal.
1/4/82	am	336.	Fld non-party applnt, Joan Lavine's, AMNDED NOTC OF APPEAL to 9th Cir C/A frm ord ent 12/16/81.
1/5/82	ew		Fld orig reptr's transc of proc had on 12/7/81.
1/6/82	mm	337.	Fld design of portions of transc to be included in record on appeal.
1/6/82	mm	338.	Fld notc of PTC & ORD re unserved parties: PTC 3-15-82 at 9:30 a.m. PTC ORD due 4:30 3-8-82.
*10/30/81	mm	339.	Fld correspondence to Judge Tashima fr Wm. John Kennedy

DATE	NR.		PROCEEDINGS
10/29/81	mm	340.	Fld pltfs' reply to oppo to pet for atts' fees.
		341.	Fld appellant's objs to prop ord denying motn for recon.
2/5/82	mm	342.	Fld list of exhs & witns.

2. *Westcot B. Stone III, et al. v. Western Air Lines, Inc.*— Docket No. CV-81-5521-AWT.

DATE	NR.		PROCEEDINGS
10/26/81	kmb	1.	Fld Cmplt. Issd summs. Case may be referred to Mag Reichmann for dscvry.
10/27/81	sb	2.	Fld notc of cont pltf motn fr prelim inj to 11-23-81 10am
		3.	Fld applic of non resident atty to appear & Ord (LTL) design Fred Radsdale
10/26/81	sb	4.	Fld pltf aff of Jack R Dean in suppt of motn fr prelim inj
		5.	Fld pltf aff of Alan McLaren in suppt to motn fr prelim inj
		6.	Fld pltf aff of Brentnall J Higgs in suppt of motn fr prelim inj
		7.	Fld pltf aff of Bill Pelton in suppt of motn fr prelim inj
		8.	Fld pltf aff of Charles Criswell in suppt of prelim inj
		9.	Fld pltf aff of Albert White in suppt of motn fr prel inj
		10.	Fld pltf aff of Robert Butler in suppt of motn re prelim inj
		11.	Fld pltf aff of Henry Weigand in suppt of motn fr prelim inj
		12.	Fld pltf memo of P/A in suppt of motn fr prelim inj
		13.	Fld pltf aff of Norval Cavett in suppt of motn fr prel inj
		14.	Fld pltf aff of Westcot Stone III in suppt of motn fr prelim inj

DATE	NR.		PROCEEDINGS
		15.	Fld pltf notc of motn 11-16-81 10am
11/5/81	sb	16.	Fld deft ANSWER TO COMPLT
		17.	Fld deft THIRD PTY COMPLT fr declaratory releif lssd summs
11/9/81	sb	18.	Fld det & 3 pty complainant notc of lodging of docs
		19.	Fld deft memo of P/A in opp to pltf motn fr prelim inj aff of Donald Vena
11/10/81	sb	20.	Fld pltf scknowledgemnt & acceptance of serv
		21.	Fld pltf supplemental aff of Henry Weigand in suppt of motn fr prelim inj
		22.	Fld pltf aff of Rulon Starley in suppt of motion fr prelim inj
10/28/81	cm	23.	Fld ORD (AWT, LTL) transfrng actn to A. Wallace Tashima for all fur procedngs. cc parties.
11/13/81	sb	24.	Fld 3pty def Stip & Ord (AWT) fr appearance acknowledgemnt of serv waiver of notc of motn & fr ord approving same hrg 11-23-81 10am
		25.	Fld deft supplemental memo of Western Airline aff of Robert Matthews
		26.	Fld applic & Ord (AWT) allwing Haley Bader & Potts to appear as non resident atty design Fred Radsdale as local cnls
11/12/81	sb	27.	Fld deft 3pty complt notc of motn & motn fr declaratory releif suppting memo retbel 11-2-381 10am
		28.	Fld pltf reply yo opp to motn fr prelim inj

DATE	NR.		PROCEEDINGS
11/19/81	sb	29.	Fld 3pty dfet position w/ resp to motn fr prelim inj
11/20/81	sb	30.	Fld Letter fr Raymond Fay re pending pending prelim inj
		1.	MIN ORD: pltf motn fr prelim inj pltf has to 11-30-81 to file supplemental aff re bids deft has to 12-7-81 to file counter aff or reso resp to pltf 3pty deft may file resp crt will take the matter und submission w/o fur oral oral
11/30/81	sb	32.	Fld THIRY PTY DEFT ANSWER TO HIRD PTY COMPLT
11/25/81	sb	33.	Fld deft applic & Ord (AWT) non resi-dnet atty Cohen Weiss Simon design Susan Hershmna
11/30/81	sb	34.	Fld pltf declar of Jack Dean
		35.	Fld pltf declar of Bill Pelton
		36.	Fld pltf declar of Henry Wiegand
		37.	Fld pltf declar of Brentnal Higg
11/30/81	sb	38.	Fld pltf supplemental memo in suppt of motn fr prelim inj
12/7/81	sb	39.	Fld deft supplemtnal memo in resp to motn fr prelim inj aff of Richard Mitchell
		40.	Fld pltf notc of mailing
12/7/81	sb	41.	Fld Stip & Ord (AWT) ex ti file resp to pltf supplemental paper to 12-11-81
12/11/81	sb	42.	Fld 3pty deft memo of Air Line Pilots Assctn w/ respect pltf motn a prelim inj
		43.	Fld aff of Kenneth Shackelford Jr w/ respect to motn fr prelim inj

DATE	NR.		PROCEEDINGS
12/17/81	sb	44.	Fld PRELIMARY INJUNCTION (AWT) ORD the deft Western Airline Inc its officer agents, servant, employees & all person in active concert etc are hereby enjoined & restained from not reinstating pltf Albert White to secons officer position which held commencement of this actn & not cont pltf White position fr any reason based on age & Ord pltf White shall retn him employment at full salary reflecting his seniority & position & shall retain his place on the pilot seniority list, Shall cont to make regular contribution Pilot Variable Pension Plan fr his account, Shall allow him elect whether or not commence receipt of benefits which he is entitled under Pilots Fixed Pension Plan retroactive to his 60th Birthday or upon actual retirement etc & Prelim inj shall become effective upon giving of security in the sum of $5,000.00 pur to Rule 65(c) FRCP (ENT 12-18-81)
12/17/81	sb	45.	Fld Memo decision & Ordpltf motn fr prelim inj granted w/ respect to pltf Whit is DENIED w/ respect to remaining pltf Western Airline motn fr declaratory releif pendente Lite against 3pty deft DENIED.
1/4/82	sb	46.	Fld Under taking Bond pltf prelim inj in the amount of $5,000.00 Surety Ins Co of CA
1/13/82	ew	47.	Fld dft's NOTC OF APPEAL to 9th Cir C/A frm Prelim Inj ent 12-18-81. $70.00 fldng & docket fees pd.
1/22/82	sb	48.	Fld deft Transcript designatio & Ord form copy of transcript

DATE	NR.		PROCEEDINGS
1/28/82	sb	49.	Fld pltf notc of tkn depo of Richard Mitchell Robert Fitch, Donald Vena Seth Oberg Jr 2-5-82 William Newell 2-6-82
2/2/82	ew		Fld orig rptr's transc of procd held on 11-23-81.
2/22/82	rlb	50.	Fld stip & ORD re breifing schdl fr mots to be fld.
*2/19/82	cw	51.	Fld defts ntc of mtn rtnbl 3-22-82, 10am for s/j against certain pltfs; supporting memo of P&A.
			LODGED defts prop findings.
			LODGED defts prop partial s/j.
2/26/82	rlb	52.	Fld pltfs' ntc of mot, rtnbl 3/22/82, 10am, re prlm inj.
		53.	Fld plfs' renewed mot for prlm inj & mot for reconsid; stmt of compliance.
3/15/82	yd		Fld DEPOSITION of Donald W. Vena tkn on 2-5-82
	yd		Fld DEPOSITION of Richard Mitchell tkn on 2-5-82
	yd		Fld DEPOSITION of Robert Fitch tkn on 2-5-82
	yd		Fld DEPOSITION of William E. Newell tkn on 2-6-82
	yd		Fld DEPOSITION of Seth M. Oberg, Jr. tkn on 2-5-82
*3/3/82	lps		Fld deft's resp to pltfs' mot for reconsidrtn.
3/8/82	lpc		Fld 3rd pty deft's memo in suppt of Western Air Lines mot for partial S/J & in opp to pltfs' renewed mot for prelim inj & reconsidrtn.

DATE	NR.	PROCEEDINGS
		Fld pltfs stmt fo gen issues of materia fact.
		Fld pltfs opp tomot for S/J agst cert pltfs.
3/16/82	rlb	58. Fld plfs' reply in suppt renewed mot for prlm inj & mot for reconsid.
3/23/82	rlb	59. Fld app & ORD allowing Jay P. Levy-Warren to appear as non rsdnt atty, naming Susan R, Hershman as lcl cnsl for 3rd prty dfts.
*3/22/82	rlb	60. MIN ORD: HRG plf's renewed mot for prlm inj & for reconsid & dft's mot for prtl S/: Crt ORDs mots tkn under Submission.
4/19/82	jed	61. Fld 3rd pty defts' Suppl memo in suppt of Western Air Lines, Inc.'s motn for partial S/J and in oppos to pltfs' renewed motn for prelim inj and reconsideration.
4/21/82	jcd	62. Fld deft-Appellant's Designation of Clerk's Rec on appeal.
5/7/82	rlb	63. MIN ORD: ORD plf Granted 2 wks to srv & file suppl brief re plf's mot for reconsid.
5/24/82	SR	64. Fld pltf's resp to ALPA's SUPPLEMTAL MEMO.
6/23/82	sas	65. Fld 3rd prty dfts notc of mot to file memo in resp to pltf suppl memo dated 5-21-82. Rtnbl 7-26-82 at 10am
		66. Fld 3rd prty dft mot to file memo in resp to pltf suppl memo
		67. Fld 3rd prty dft memo of P/A in suppt of mot to file memo in resp
		68. Fld 3rd prty dft decl of Susan R. Hershman in suppt of mot to file memo

DATE	NR.	PROCEEDINGS
		69. Fld prop memo of Air Line Pilots in resp to pltf memo of 5-21-82.
6/30/82	jcd	70. Fld deft & 3rd pty complainant Western Air Lines Inc's Statement of non-oppos to motn.
7/8/82	rlb	71. Fld Crt's Memorandum Opinion & ORD that plfs' mot for reconsid is Granted & on reconsid the mot for prelm inj is Denied; Western's mot for S/J is Denied. (Ent 7/12/82 m/cpys & ntfd prtys)
		72. MIN ORD: Mot 3rd prty dft ALPA to file suppl memo, set for hrg 7/26/82, is tkn off cal as moot. However, the proposed memorandum Is ord fld.
*7/6/82	gth	73. Fld pltfs-appelees' opp to Alpa's mot to file addtl memo.
10/8/82	gth	74. MIN ORD: OSC nlt 10/29/82 why actn should not be dism of non-complianc w/local rule. Cnsl are advised that Crt will considr filing of joint rept of early mtg on or before 10/29/82 as satisfactory respons to OSC
10/27/82	gth	75. Fld pltf's rept
11/9/82	gth	76. Fld ORD(AWT) that w/in 30 days aftr decisions on appeal in Criswell v. Western Air Lines & in appeal frm the grntng of a partial prelim inj the parties shall fil a detaild joint stat rept whch shall addrress all of mattrs set forht in local rul
6/13/83	gth	77. Fld pltfs notc of chang of add.
9/8/83	gth	78. NOtc of filng. Plaintiff
9/15/83	vu	79. Consent to be made party plaintiff. Plaintiff

DATE	NR.		PROCEEDINGS
		80.	Notice of filing Plaintiff
9/20/83	vu	81.	Consent to be made party pltf
12/19/83	vu	82.	Notc of filing of Consent to be Made Party Plft Plft
1/12/84	lpc	83.	Notc & motn fr partial S/J 2-6-84-Plaintiff
			LODGED prop statmnt of uncont facts & conclu of law
			LODGED prop S/J
		84.	Memo of P/A in suppt-Plaintiff
		85.	Affidavit s in supp-Plaintiff
1/19/84	wa	86.	Stip & ORD contg pltfs' motn fr prtl S/J to 2/27/84, 10AM. Opp papers due 2/7/84, Reply papers due 2/14/84.
1/24/84	vu	87.	Notc that Judge Tashima postponed date for hrng plft's motn for S/J until 2/27/84 Deft
2/7/84	vu	88.	Memo in opp to motn for S/J Deft
		89.	Stmt of genuine issues Defendant
2/8/84	vu	90.	Memo in opp to motn for partial S/J 3rd party defts
2/14/83	lp	91.	Reply memo in supprt of pltfs mot for partial S/J, 2/27/84 10am. pltf.
2/22/84	vu	92.	Reply memo in suppt of motn for partial S/J Plfts
3/9/84	rn	93.	Fld Memo ORD (AWT) that pending trial on the merits, pltf who so elect shl be reinstated to their employment w/ Western w/full seniority as stated in pleading; Western & ALPA meet and discuss the following items set forth in

DATE	NR.		PROCEEDINGS
			the pleading and shl submit a report to the Crt on or before May 15, 1984; no bond will be required; this Prelim Injunctn shl be binding upon Western, upon ALPA upon all Western pilots rep by ALPA havg notc and all persons acting under their auth or in concert therewith (ENT 3-12-84) Mld cpys & NOtc
3/8/84	lpc	94.	Ltr/dated 3-2-84 frm Levy-Warren to Judge Tashima w/draft ord & inj attached
		95.	Ltr/3-7-84 frm Kennedy to Judge Tashima w/draft ord & inj attached
		96.	Ltr/3-1-84 frm Fay to Judge Tashima w/draft ord & inj attached
*2/27/84	vu	97.	Pltf's motn for partial S/J cont to 2/28/84 @ 10 a.m. MO
*2/28/84		98.	Crt takes plft's motn for S/J under submsn. MO
3/9/84	vu	99.	Letter to Judge Tashima from Raymond C. Fay, Esq. re prelim injunc
3/14/84		100.	Letter to Judge Tashima from Jay P. Levy-Warren re prelim injunc
3/20/84		101.	Notc of filing of certificates of election of reinstmt Plfts
3/22/84		102.	Stmt purs to Local Rule 7.18.1 Plfts
		103.	App for ex parte order Plfts
		104.	Memo in suppt of emergency motn for clarification of 3/9/84 Plfts
		105.	ORD that plfts' ex parte app that crt issue order is DENIED, but req is GRANTED to set matter for hrng on 4/26/84 @ 9:30 a.m.

DATE	NR.		PROCEEDINGS
3/23/84		106.	Memo in opp to plfts' emergency motn for clarification of med testing injunc Deft
3/30/84	vu	107.	Opposing memo Deft Western Airlines
		108.	Memo in suppt of emergency motn for clarification Plfts
4/13/84	nm	109.	Notc of filingsuppl excerpts of Criswel trial recd in oppo to pltf's mot for partial S/J. Deft
4/20/84	nm	110.	Aff of Stanley R. Mohler, M.D.
		111.	Pltfs' reply memo in suppt of mot for clarification of 3/9/84 memo ord of prelim inj & for other relief.
4/23/84	nm	112.	Memo of Air Line Pilots Assn International w/respect to pltfs' emergency mot for clarification of medical testing inj. 3d party defts.
4/24/84	nm	113.	Notc of filing FAA w/d of advance notc of prop rulemaking 82-10. Deft
4/26/84	nm		LODGED DEPOS of Dr. Douglas Busby tkn 4/13/84.
		114.	Memo ORD on pltfs' mot for clarification of the Memo Ord of Prelim Inj re any medical exama administered by Western to 2d officers over age 60, purs to para 7 of 3/9/84 Ord of Prelim Inj. shall be limited to those permitted by the FAA 1st class medical exam:
		115.	Hrg: Crt grt pltf's applic to limit physical exam that defts may administer to pltf. MO
4/5/84	nm	116.	Ltr dtd 4/4/84 fm Wm. John Kennedy to Judge Tashima re supply to West-

DATE	NR.		PROCEEDINGS
			ern's memo fld 3/30/84 re emergency mot for clarification.
5/15/84	nm	117.	Stip & ORD contg to 6/5/84 for deft Western to subm status rpt.
5/24/84	nm	118.	Notc of chg of address.
6/6/84	nm	119.	Rpt of Western Air Lines subm purs to Ord of Crt; affs of Douglas Busby, M.D. & Wm F. Brath, M.D. Deft
			LODGED DEPOS of Stanley R. Mohler, M.D. tkn 4/23/84.
6/11/84	nm	120.	Crt's note re disc cutoff completed 8/24/84 & PTC set 9/24/84 130pm.
6/15/84	nm	121.	Rpt of Air Line Pilots Assn, Internat purs to 3/9/84 Ord of this Crt.
8/3/84	nm	122.	Stip & ORD that all fur proceedings in case stayed until final actn by Supreme Crt in Criswel except: 1. Ruling on mot for partial S/J now u/subm; matters which may arise concerning prelim inj issd in this case; ptys to fi a jt status rpt on fur sched in this case w/ in 30 days of (a) denial of certiorari or (b) issu of mandate of consideration on merits.
8/20/84	lp	123.	Fld mdmo ORD on mot for partial SJ

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV-78-2184-MML

CHARLES G. CRISWELL, ALBERT RON,
RULON H. STARLEY,
Plaintiffs,

v.

WESTERN AIR LINES, INC.,
Defendant.

[Filed Jul. 17, 1978]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. Plaintiffs are employees of defendant. Plaintiffs Criswell and Starley are DC-10 Captains and Plaintiff Ron is a DC-10 Second Officer (flight engineer).

2. The Federal Aviation Administration's "Age 60 Rule", 14 C.F.R. § 121.383(c), bars plaintiffs from working as Captain after age sixty. The Age 60 Rule does not bar plaintiffs from working as Second Officer after age sixty.

3. Each plaintiff informed defendant of his intention to continue his employment beyond the date of his sixtieth birthday in the position of Second Officer. The date of the sixtieth birthday of each plaintiff is after April 6, 1978.

4. Plaintiffs Criswell and Starley submitted bids for the position of Second Officer for vacancies which were to become effective prior to the dates of their sixtieth birthdays. Plaintiff Criswell was denied his Second Officer bid by defendant. Plaintiff Starley was awarded his Second Officer bid in October 1977 and provided access to defendant's training facilities. In March 1978, Plaintiff Starley's bid was cancelled by defendant.

5. In order to assume the position of Second Officer, Plaintiffs Criswell and Starley would have to undergo substantial training at the expense of defendant and would have to qualify as flight engineers in accordance with the Federal Aviation Regulations.

6. Although Plaintiffs Criswell and Starley do not possess the qualifications of Second Officer (flight engineer), those qualifications are held by Plaintiff Ron. If Plaintiff Ron's employment is interrupted, he will lose his current qualifications in a matter of months.

7. In February 1978, defendant informed Plaintiffs Ron and Starley in writing that they be required to retire at age sixty due to the "mandatory age" set forth in the collectively bargained Pilot Pension Plan applicable to plaintiffs. Defendant also communicated to Plaintiff Criswell that he would be required to retire at age 60.

CONCLUSIONS OF LAW

1. Plaintiffs requesting preliminary injunctions must show either (1) probable success on the merits and possible irreparable harm; or (2) sufficiently serious questions going to the merits so as to make them fair ground for litigation and a balance of hardships tipping decidedly in their favor. *Aguirre v. Chula Vista Sanitary Service*, 542 F.2d 779 (9th Cir. 1976), *Wm. Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 526 F.2d 86 (9th Cir. 1975).

2. The Age Discrimination in Employment Act ("ADEA"), as amended effective April 6, 1978, prohibits the application of a collectively bargained employee benefit plan to require or permit the involuntary retirement of an individual under 65 years of age. 29 U.S.C. § 623

(f)(2); Employment Act Amendments of 1978, P.L. 95-256, 92 Stat. 189.

3. Plaintiffs Criswell and Starley rely on the Pilot Agreement between Western and the Airline Pilots Association, International ("ALPA") and on the ADEA as giving them the right to bid for the Second Officer position after their sixtieth birthday. For the purposes of the present Motion for Preliminary Injunction, it appears to the Court that Criswell and Starley have not shown that they have a right to downbid to the Second Officer position. However, they have shown serious questions going to the merits to make this issue fair ground for litigation.

4. Plaintiff Ron has shown probable success on the merits in that Western has not shown an age of less than 65 is a bona fide occupational qualification for the Second Officer position, and that Ron cannot be required to retire under the collectively bargained Pilot Pension Plan at the age of 60.

5. Plaintiffs Criswell and Starley have not shown a balance of hardships tipping decidedly in their favor. They do not possess at the present time the qualifications for the Second Officer position. To afford them those qualifications would be a substantial burden and expense to defendant.

6. Plaintiff Ron has shown possible irreparable harm in that he will lose the qualifications for the Second Officer position if forced to retire at age 60.

7. Therefore, in accordance with the Order entered on this date, the preliminary inunction is denied as to Criswell and Starley, and is granted as to Ron.

Dated: July 17, 1978

/s/ Malcolm M. Lucas
MALCOLM M. LUCAS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 78-2184-MML (GX)

CHARLES G. CRISWELL, ALBERT RON,
RULON H. STARLEY,
Plaintiffs,

v.

WESTERN AIR LINES, INC.,
Defendant.

[Filed Jul. 17, 1978]

PLAINTIFFS' PROPOSED ORDER

Upon consideration of the Motion for Preliminary Injunction filed by the Plaintiffs Charles G. Criswell, Albert Ron, and Rulon H. Starley, the opposition of Defendant Western Air Lines, Inc., the reply of plaintiffs, and the argument of the parties heard in open court, it is this 26th day of June, 1978,

ORDERED that:

(1) Pending the final determination and hearing of this action, Defendant is enjoined from prohibiting the continued employment of Plaintiff Albert Ron beyond the date of his 60th birthday in the position of Second Officer (flight engineer), and such continued employment shall be without interruption or loss of seniority or other employment benefits;

(2) The Motion for Preliminary Injunction is DENIED in all other respects; and

(3) A bond in the amount of $———— shall be given by Plaintiff Albert Ron as security.

This order is in accordance with the findings of fact and conclusions of law entered this date.

Date: Jul. 17, 1978

/s/ Malcolm M. Lucas
Judge
United States District Court

APPROVED AS TO FORM:

_____

Counsel for Defendant

JURY INSTRUCTIONS

[Docket No. 229]

The following were the instructions given to the jury in *Criswell, et al. v. Western Air Lines, Inc.*, No. CV 78-2184-AWT.

Members of the Jury:

Now that you have heard the evidence and the argument of counsel, it becomes my duty to instruct you on the law that applies to this case.

1. *Function of the Jury.* You are the sole judges of the facts. However, it is your duty to follow and to apply the rules of law stated in these instructions, to the facts as you find them. You are not to single out one instruction, but must consider them as a whole.

You must not be influenced by sympathy, passion, prejudice or public opinion. You are to perform your sworn duty without bias or prejudice for or against any party.

2. *Judging Witnesses.* You are the sole judges of the credibility of the witnesses and the weight to be given to their testimony. You may consider the appearance and conduct of the witness, the manner in which he [or she] testifies, the character of the testimony, and evidence to the contrary.

You should carefully scrutinize all the testimony, the circumstances under which each witness has testified, and every matter which tends to show whether a witness is worthy of belief.

Consider each witness' intelligence, motive, state of mind, and demeanor. Consider the witness' ability to observe the matters as to which he [or she] has testified, whether he [or she] has an accurate recollection of those matters, and the extent to which, if at all, he [or she] is either supported or contradicted by other evidence. Con-

sider also any relation each witness may bear to either side of the case and the manner in which each witness might be affected by the verdict.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, or whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves.

In summary, you may consider every matter that has a tendency in reason to prove or disprove the truthfulness of the testimony of every witness.

3. *Number of Witnesses.* You are not bound to decide an issue based upon the testimony of a number of witnesses which does not produce conviction in your mind, as against the testimony of a lesser number of other evidence which appeals to your mind with more convincing force.

You are not to decide an issue by the simple process of counting the number of witnesses who have testified on opposing sides. The test is not in the number of witnesses, but in the convincing force of the evidence.

4. *Impeachment-Inconsistent Statements or Conduct-Falsus in Uno Falsus in Omnibus.* A witness may be discredited or impeached by contradictory evidence; or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars; and you may reject all the testimony of that witness, or give it such credibility as you may think it deserves.

5. *Depositions—Use as Evidence.* During the trial certain testimony has been read to you by way of deposition. The testimony of the opposing party, its agents or a witness who cannot be present is usually presented in writing under oath, in the form of a deposition. Such testimony is entitled to the same consideration and, insofar as possible, is to be judged as to credibility, and weighed, and otherwise considered in the same way as if the witness had been present.

6. *Deposition for Impeachment.* Prior to the trial, depositions were taken of the parties and witnesses, parts of which were read into evidence. If, in said deposition, any statement was made in conflict with the witness' testimony in court, you may consider such conflicts and any explantions therefor in determining that witness' credibility as if the testimony in the deposition had been given at trial.

7. *Evidence in the Case.* The evidence consists of the sworn testimony of all witnesses, all exhibits received in evidence and all facts which have been stipulated to by the attorneys.

Anything you may have seen or heard outside the courtroom is not evidence.

A question is never evidence except as it supplies meaning to its answer.

8. *Statements of Counsel.* Statements of counsel are not evidence, unless made as an admission or stipulation.

9. *Stipulation.* A stipulation is an agreed statement of facts between the attorneys, and you must accept such facts as being conclusively proved.

10. *Objections.* When the Court has sustained an objection to a question, you must not speculate as to what the answer might have been or the reason for the objection.

If any evidence was stricken by the Court, such matter must be disregarded and treated as though you had never known of it.

11. *Opinion of the Court.* Do not assume that I hold any opinion on any matter in this case. You are at liberty to disregard all comments of the Court, except my instructions of the law.

12. *Direct and Circumstantial Evidence.* There are two types of evidence from which you may find the truth of the facts of a case. One is direct evidence—such as the testimony of an eyewitness. The other is circumstantial evidence—the proof of a chain of circumstances pointing to the existence of a fact. Both direct and circumstantial evidence are accepted as a method to prove a fact, and each is respected for such convincing force as it may carry.

13. *Inferences.* You are not limited in your consideration of the evidence to the bare words of the witnesses. You are authorized to draw such inferences as are justified in the light of your experience as reasonable persons. An inference is a deduction or conclusion which reason and common sense lead one to draw from proved facts.

14. *Expert Testimony.* A witness who has special knowledge, experience, training or education in a particular science, profession or occupation may give his or

her opinion as an expert as to any matter in which he or she is skilled. You should consider each expert opinion received in evidence and give it such weight as you think it deserves. In determining the weight to be given such opinion you should consider the qualifications and credibility of the expert and the reasons given for his or her opinion. If you should decide that the opinion of an expert witness is not based upon sufficient education or experience, or that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, you may disregard the opinion entirely.

15. *Interrogatories and Admissions—Use as Evidence.* Each party has introduced into evidence certain interrogatories—that is, questions together with answers signed and sworn to by the other party. A party is bound by his sworn answers.

By introducing an opposing party's answers to interrogatories, however, the party does not bind himself to these answers, and he may challenge them in whole or in part or may offer contrary evidence.

Responses to requests for admission have also been introduced into evidence. Since these responses, by their definition, admit the matters inquired into by the other party, you are to accept the facts in the admission as true.

16. *Corporation Can Act Only Through Agents.* The defendant in this case is a corporation. Although a corporation is a person under the law, a corporation can act only through its directors, officers, employees, or other agents. The law, therefore, holds Western responsible for any unlawful acts of its directors, officers, managing agents or other agents, unless the acts were unauthorized.

Evidence that an act was done as a part of Western's business or as a part of the job assigned to an officer or

employee is sufficient for you to conclude that the act was authorized by Western.

17. *Burden of Proof.* In a civil action such as this, the plaintiffs must prove each essential element of their claim by a preponderance of the evidence.

However, Western has raised some affirmative defenses, and for these, which I will explain later, Western has the burden of establishing the essential elements, again by a preponderance of the evidence.

18. *Preponderance of Evidence.* By a preponderance of the evidence is meant such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth. In the event that the evidence is evenly balanced, your finding upon that issue must be against the party who has the burden of proving it.

In determining whether an issue has been proved by a preponderance of the evidence, you should consider all of the evidence bearing upon that issue regardless of who produced it.

19. *Reasonable Certainty.* Although the burden is on a party to prove his claim by a preponderance of the evidence, this does not require proof to be an absolute certainty, since such proof is seldom possible in any case.

In a civil action such as this, it is proper to find that a party has succeeded in carrying the burden of proof on an issue of fact if, after consideration of all the evidence, the jurors believe that what is sought to be proved on that issue is more likely true than not true.

20. *Purpose of ADEA.* Congress has declared that the purpose of the Age Discrimination in Employment Act, called the "ADEA", is "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help

employers and workers find ways of meeting problems arising from the impact of age on employment."

21. *Prohibition Against Discrimination.* Under the ADEA, it is unlawful for an employer:

> 1. to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privilege of employment, because of such individual's age;
>
> 2. to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

Plaintiffs contend that defendant violated those provisions.

22. *Protected Ages.* Until January 1, 1979, the protection of the ADEA applied to individuals between 40 and 65 years of age and since that date has applied to persons between 40 and 70 years of age.

23. *Defenses in Act.* The ADEA states that it is not unlawful for an employer to take action otherwise prohibited where "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age." Defendant Western contends that it did not violate the ADEA, and in addition contends that its actions are not unlawful for these reasons.

24. *Prima Facie Showing.* I instruct you that, in this case, plaintiffs have made a preliminary or prima facie showing under the ADEA. This simply means that, if defendant had produced no evidence at all, there would have been sufficient evidence to find a violation of the law by defendant.

All three plaintiffs have made a preliminary or prima facie showing by the fact that they were within the age limits protected by the law, that they were qualified for the jobs they held, and that they were replaced or were to be replaced by younger persons. In addition, plaintiff Ron has established that he was involuntarily retired and plaintiffs Criswell and Starley have established as part of their prima facie showing that they applied for the position of Second Officer and were denied the opportunity to work in that position, and that they were qualified to become Second Officers.

The establishment of the prima facie showing does not mean that you must find for plaintiffs. It means that you should go on to consider defendant's evidence that its actions were not unlawful, and plaintiffs' evidence in response to defendant's evidence.

25. *Discriminatory Treatment—Plaintiffs' Contentions.* Plaintiffs contend that defendant violated the ADEA by discriminatory treatment on the basis of age. Plaintiffs contend that they were subject to discriminatory treatment on the basis of age because of defendant's involuntary retirement of plaintiffs at age sixty. Plaintiffs Starley and Criswell further contend that they were subject to discriminatory treatment on the basis of age because of Western's refusal to permit them to become Second Officers.

The burden of proof is on the plaintiffs to show discriminatory treatment on the basis of age. To render a verdict for any plaintiff, you must find, by a preponderance of the evidence, first, that plaintiff was subject to discriminatory treatment on the basis of age, and, second, that age is not a "bona fide occupational qualification," and that, with respect to plaintiffs Starley and Criswell, defendant's actions were not based on "reasonable factors other than age." I will instruct you separately as to the "bona fide occupational qualification"

and "reasonable factors other than age" aspects of the case.

In order to prove discriminatory treatment on the basis of age, plaintiffs must show discriminatory motive or intent on the part of defendant. Ordinarily intent or motive cannot be proved directly because it is too difficult to fathom or scrutinize the operations of the human mind. In addition to direct proof, then, you may infer intent or motive from surrounding circumstances. You may consider any statements made or acts done or omitted by a party whose motive or intent is at issue; you may also consider all other facts and circumstances which indicate defendant's state and mind.

26. *Disparate Impact-Plaintiffs' Contentions.* Plaintiffs Starley and Criswell contend that Western's refusal to permit them to become Second Officers violated the ADEA because of actions which have a disparate impact upon them, on the basis of age. Plaintiffs Criswell and Starley contend that Western's policies and practices on downbidding unfavorably impacts upon the persons in their age group. This contention is made separately from their contention that they were subject to discriminatory treatment on the basis of age because of Western's refusal to permit them to become Second Officers. Even if you find that Western's refusal to permit plaintiffs Starley and Criswell, or either of them, to become Second Officers was not because of discriminatory treatment on the basis of age, you may still find that this action of Western violated the ADEA because of disparate impact, unless it was justified by business necessity. I will instruct you separately on business necessity.

I instruct you that disparate impact occurs when an employment practice or policy, which is neutral on its face in its treatment of persons in different age groups, falls more harshly on older persons—here Captains at or nearing age sixty—than on younger persons, and cannot be justified by business necessity.

The burden of proof is on plaintiffs Starley and Criswell to show disparate impact. If you find, by a preponderance of the evidence, that Western's refusal to permit Captains at or nearing age sixty to downbid or to become Second Officers creates a disparate impact upon persons in that age group, then you are to find, for each plaintiff to whom the finding applies, that this action violates the ADEA. In making this finding, however, you must also have found that this action is not justified by business necessity.

With respect to your consideration of Western's refusal to permit plaintiffs Starley and Criswell to become Second Officers, there are important differences in considering the issue from the point of view of disparate impact as opposed to discriminatory treatment. For disparate impact, Western's actions may be justified only by business necessity. For discriminatory treatment, Western's actions may be found lawful because of a "bona fide occupational qualification" or because of "reasonable factors other than age." While the same evidence, or some of it, may enter into your deliberations on both the disparate impact and discriminatory treatment issues, you are instructed to follow the legal tests separately for each as I have stated them to you.

Another difference between disparate impact and discriminatory treatment relates to plaintiffs' burden of proof. Unlike discriminatory treatment, under the disparate impact issue a showing of discriminatory motive or intent is not required.

27. *Business Necessity.* If you find that Western's refusal to permit plaintiffs Starley and Criswell to become Second Officers has a disparate impact on the basis of age, you are to go on to consider whether Western's challenged actions regarding downbidding and downgrading are justified by business necessity.

The burden of proof is on defendant to show business necessity. Administrative or business convenience is not

enough. Defendant must show, by a preponderance of evidence, that the challenged policies or practices bear a substantial relation to the job performance of plaintiffs Starley and Criswell as Second Officers. Western must show that there is a substantial business purpose such that its challenged policies or practices on downbidding and downgrading are necessary to the safe and efficient operation of its business. Western must also show that:

(1) the challenged policies or practices on downbidding and downgrading effectively carry out the business purpose they are alleged to serve; and

(2) there are available to defendant no reasonably acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser impact on the basis of age.

28. *BFOQ Defense.* If you find that plaintiffs have persuaded you by a preponderance of the evidence that their involuntary retirements were the result of policies in which age discrimination was a determining factor, then you must consider defendant's defense that age is a "bona fide occupational qualification" for its Second Officers (flight engineers). This defense is usually abbreviated "BFOQ". The BFOQ defense is available only if it is reasonably necessary to the normal operation-essence-of defendant's business. In this regard, I instruct you that the normal operation-essence-of Western's business is the safe transportation of air passengers.

The burden of proof to show a BFOQ is on the defendant. If defendant establishes such a BFOQ by a preponderance of the evidence, then its age discrimination is lawful under the ADEA.

One method by which defendant Western may establish a BFOQ in this case is to prove

(1) that in 1978, when these plaintiffs were retired, it was highly impractical for Western to deal with each Second Officer over age 60 on an individualized basis to determine his particular ability to perform his job safely, and

(2) that some Second Officers (flight engineers) over age 60 possess traits of a physiological, psychological, or other nature which preclude safe and efficient job performance that cannot be ascertained by means other than knowing their age.

In evaluating the practicability to defendant Western of dealing with Second Officers over age 60 on an individualized basis, with respect to the medical testimony you should consider the state of the medical art as it existed in July 1978.

29. *FAA "Age 60 Rule"*. Testimony has been given in this case about the FAA or the Federal Aviation Administration's "Age 60 Rule."

You are instructed that the FAA's Age 60 Rule does not apply to the position of Second Officer, which is equivalent to the position of "flight engineer." The Age 60 Rule does not prevent a person from serving as a Second Officer after his sixtieth birthday.

The Age 60 Rule does not constitute either approval or disapproval by the FAA of the use of flight engineers over age 60.

30. *"Reasonable Factors"*. Defendant contends that its actions with respect to plaintiffs Criswell and Starley in refusing to permit each of them to work in the position of Second Officer were not unlawful because they were based on reasonable factors other than age. Specifically, Western contends that its actions were based on reasonable factors other than age because each downbid was improper under a particular provision of the pilot agreement. I instruct you that this is a reasonable

factor other than age. This does not end the inquiry, however, and you must determine whether, taking the evidence as a whole, age was a substantial and determinative factor—in Western's refusal to allow either plaintiff to work as a Second Officer.

To find that either plaintiff Criswell or Starley was discriminated against because of his age in violation of the ADEA you need not find that age was the sole motivation or reason for defendant's refusal to allow him to work as a Second Officer. Rather, you need only find that age was a substantial and determinative factor—in defendant's decision. If more than one factor affected the decision, and if one of these factors was plaintiff's age, and it was substantial and determinative in whether he could work as a Second Officer, then you must find that there were no reasonable factors other than age.

31. *Replacement Job*. It is undisputed that at the time plaintiffs Criswell and Starley were involuntarily retired at age 60, they were employed by Western as Captains on DC-10 aircraft.

You are instructed that retirement from service as captains was mandated solely by the application of the FAA Age 60 Rule and such retirement does not violate the ADEA.

You are also instructed that when a person is retired from one position for valid reasons under the ADEA, that Act does not require Western to provide a replacement job where one is not otherwise available or other special treatment for such employees.

32. *Pretext*. Even if you find for the defendant with respect to one or more of its defenses, plaintiffs may still prevail if plaintiffs show by a preponderance of the evidence that the reasons stated in defendant's case are merely pretexts for age discrimination. On this question, you are instructed that it is the plaintiffs' burden to persuade you that defendant's actions toward them

is a pretext or cover-up for age discrimination; it is not defendant Western's burden to prove a contrary freedom from such illegal motivation.

33. *ADEA 4(f)(2).* You have heard some evidence concerning the Western Airlines Pilots Pension Plan, and defendant's reliance upon the normal retirement age of 60 in that pension plan as the reason for requiring the retirement of plaintiffs at age sixty. Effective April 6, 1978, the ADEA was changed to provide that a Pension Plan could not be used to require the involuntary retirement of individuals under age 65.

34. *Damages.* If you find that the plaintiffs, or any of them, are entitled to a verdict, then you are to consider the issues of damages for each such plaintiff. The law provides that each plaintiff whom you find is entitled to a verdict should be fairly compensated by the defendant for damages which were a result of defendant's conduct in violation of the ADEA.

For each plaintiff who is entitled to a verdict, in arriving at the amount of the damages award, you should include:

1. The amount of wages and other earnings the plaintiff would have received from defendant, less any amount received under the Western-ALPA Fixed and Variable Pilot Pension Plans.

2. The amount of insurance benefits that would have been paid for by defendant, less the value of insurance benefits received after retirement.

In computing money damages, you may not rely on speculation or guesswork. Absolute precision is not required, however, and for each plaintiff whom you find is entitled to a verdict you may make an estimate of the amount of money that will constitute just and reasonable compensation based on the facts that are before you.

35. *Willfulness.* If you find that plaintiffs, or any of them, are entitled to a verdict, you are then to consider,

in addition to the question of damages, the issue of whether defendant's violation of the ADEA was "willful." A violation is willful if the unlawful action taken is intentional, knowing, or voluntary, as distinguished from conduct that is accidental or unknowing. Your determination on the isuse of a willful violation as to any plaintiff is to be made only if and after you have rendered a verdict for that plaintiff.

36. *Jury's Recollection Controls.* If any reference by the Court or by counsel to matters of evidence does not coincide with your own recollection, it is your recollection which should control during your deliberations.

37. *Individual Opinion.* The verdict must represent the considered judgment of each juror and each juror must agree to it. In other words, your verdict must be unanimous. It is your duty to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment.

Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors.

In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if you are convinced that it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence, solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict.

Remember that you are not partisans. You are the impartial judges of the facts. Your sole interest is to ascertain the truth from the evidence of the case.

38. *Communications Between Court and Jury.* If it becomes necessary to communicate with the Court, you may send a note by a bailiff, signed by any member of the jury. You should never attempt to communicate by any

means other than a signed writing. The Court will never communicate with you on any subject touching the merits of the case, except in writing, or in open court.

You will note from the oath about to be taken by the bailiffs that they are forbidden to communicate with any member of the jury on any subject touching the merits of the case.

You are never to reveal—not even to the Court—how the jury stands, numerically or otherwise, on any question submitted to you until after you have reached your verdict.

39. *Verdict—Jury's Responsibility.* It is proper to add the caution that nothing said in these instructions—nothing in any form of verdict prepared for your convenience—is to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is the sole and exclusive duty and responsibility of the jury.

40. *Foreperson; Returning Verdict.* Upon retiring to the Jury Room, you will select one of your number to act as your foreperson. That person will preside over your deliberations, and will speak for you in Court.

Forms of verdict and a special interrogatory have been prepared for your use. You will take these forms to the Jury Room and, when you have reached your verdict, you will have your foreperson fill in, date and sign the form to state the verdict and your answer to the special interrogatory upon which you unanimously agree, and then return with it to the courtroom.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 81-5521-AWT

WESTCOT B. STONE, III, *et al.*,
Plaintiffs,

v.

WESTERN AIR LINES, INC.,
Defendant.

WESTERN AIR LINES, INC.,
Third Party Complainant,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *et al.*,
Third Party Defendants.

[Filed Apr. 26, 1984]

MEMORANDUM ORDER ON MOTION FOR CLARIFICATION

This matter is now before the Court on plaintiffs' motion for clarification of the Memorandum Order of Preliminary Injunction, filed on March 9, 1984. That Order granted plaintiffs' request for reinstatement to their employment with defendant Western Air Lines

("Western") on the condition, *inter alia*, that Western be permitted, pending the first renewal of the pilot agreement between Western and the Air Line Pilot Association, International ("ALPA"), to administer to Second Officers over age 60 "such medical examinations in addition to the FAA second-class airman's examination, which Western deems appropriate to enable it to discharge its responsibility as a certificated air carrier."

Plaintiffs now seek to limit the nature and scope of Western's medical examination, on the ground that the tests being administered by Western are unwarranted, painful, and unnecessarily dangerous in the present context. At issue is whether the tests comprising Western's medical examination are appropriate to the administration of Western's so-called "senility management protocol."

The tests currently being administered by Western (collectively denominated the "Busby Protocol"), were outlined, in part, by Dr. Douglas Busby, in a letter solicited by counsel for Western in October 1981. Plaintiffs assert that the Busby Protocol differs in substantial measure from those tests proposed by Dr. Busby when testifying at trial in *Criswell* v. *Western Air Lines, Inc.* Plaintiffs do not specifically contest that the following, outlined by Dr. Busby at the *Criswell* trial, are appropriate tests: (1) medical history; (2) physical examination; (3) SMA 18 (blood test), Hemoccult and blood lipid profile; (4) urinalysis; (5) chest x-ray; (6) audiometry and vision tests; (7) spirogram; (8) exercise stress test (Bruce protocol); and (9) sputum for cytology, where history of smoking. It was contemplated that those tests could be completed apart from laboratory results, in a day or a day and one-half.

The full Busby Protocol requires administration of the following additional tests: (1) fiberoptic sigmoidoscopy; (2) electroencephalography; (3) thallium scanning; (4)

psychological testing; and (5) Holter monitoring, or echocardiography. Western has indicated that the "digital subtra[c]tion angiography," challenged by plaintiffs as a research tool, was abandoned by Western and is not presently intended to be given to plaintiffs. Dr. Busby also stated at the *Criswell* trial, that the thallium stress test might only be administered if the exercise stress test were abnormal. In January of 1980, Dr. Busby characterized this test as "strictly a research tool."

Dr. Brath, selected by Western to administer its senility management program, and Dr. Busby, are both of the opinion that a flight engineer over 60 should not be required to meet a higher or more rigorous medical standard than a crew member under age 60. Dr. Busby has further stated that, in his view, the above proposed tests are not necessary for an air carrier to comply with its obligations to discharge its responsibility as a certificated air carrier. There is no evidence that Dr. Busby or Dr. Brath have ever recommended or required, as a routine matter, that a second officer of any age submit to any of the challenged tests.

I conclude that Western has failed to demonstrate that any of the additional tests included in the Busby Protocol are appropriate to enable Western to discharge its responsibility as a certificated air carrier.

For the foregoing reasons, it is ORDERED:

Any medical examination administered by Western to Second Officers over age 60, pursuant to paragraph 7 of the March 9 Order of Preliminary Injunction, shall be limited, absent a resulting abnormality, to those permitted by the FAA First Class medical examination and the following tests:

1. medical history;

2. physical examination;

3. SMA 18 (blood test), Hemoccult and blood lipid tests;
4. urinalysis;
5. chest x-ray;
6. audiometry and vision tests;
7. spirogram;
8. exercise stress test (Bruce protocol); and
9. sputum for cytology, where history of smoking.

Dated: Apr. 26, 1984

/s/ A. Wallace Tashima
A. WALLACE TASHIMA
United States District Judge

[DEFENDANT'S EXHIBIT UU]

[Admitted November 12, 1980, Tr. 2315 D]

AGREEMENT
Between
WESTERN AIR LINES, INC.
And
THE AIR LINE PILOTS
In The Service Of
WESTERN AIR LINES, INC.
As Represented By
THE AIR LINE PILOTS ASSOCIATION
INTERNATIONAL

THIS AGREEMENT is made and entered into in accordance with the provisions of the Railway Labor Act, as amended, by and between Western Air Lines, Inc., (hereinafter known as the "Company"), and the Air Line Pilots in the service of Western Air Lines, Inc., as represented by the Air Line Pilots Association, International (hereinafter known as the "Association").

In making this Agreement, the parties hereto recognize that compliance with the terms of the Agreement and the development of a spirit of cooperation is essential for mutual benefit and for the intent and purpose of this Agreement.

It is hereby mutually agreed:

SECTION 1

RECOGNITION AND SCOPE

(A) The Air Line Pilots Association, International, has furnished to the Company evidence that a majority of the Air Line Pilots employed by the Company have designated the Association to represent them, and in their

behalf negotiate and conclude an Agreement with the Company as to hours of labor, wages, and other employment conditions covering the pilots in the employ of the Company in accordance with the provisions of the Railway Labor Act, as amended.

(B) All revenue flying of the Company and revenue operation of the Company's aircraft, including all flying over the Company's routes, shall be performed by Pilots on the System Seniority list in accordance with the then effective agreement with ALPA. There shall be no wet-lease operations or sub-contracting of flying.

SECTION 2

DEFINITIONS

As used in the Agreement, the term:

(A) "Pilot" means captain, first officer and second officer as defined herein.

(B) "Captain" means an employee who is in command of the aircraft and its crew members while on duty and who is responsible for the manipulation of, or who manipulates, the flight controls of an aircraft while under way, including take-off and landing of such aircraft, and who is properly qualified to serve as and holds a currently effective airman's certificate authorizing him to serve as such captain.

(C) "First Officer" means an employee any part of whose duty, as second in command of the aircraft and its crew members while on duty, is to assist or relieve the captain in the manipulation of the flight controls of an aircraft while under way, including take-off and landing of such aircraft, and who is properly qualified to serve as, and holds a currently effective airman's certificate authorizing him to serve as such first officer.

(D) "Second Officer" means a pilot employee assigned by the Company as third in command to aircraft required to be operated with a flight deck crew of three (3) or more, who is qualified to provide relief at all required flight crew positions except that of pilot in command. Such qualifications shall include at least a commercial pilot's license, with an instrument rating, a flight engineer's certificate, and the ability to fly the aircraft, as set forth in the Letter of Agreement dated May 31, 1960; provided, however, that the ten (10) employees designated by an asterisk on Attachment A shall not be required to have a commercial pilot's license, with an instrument rating, and the ability to fly the aircraft in order to qualify as second officers on propeller driven aircraft.

(E) "Reserve Pilot" means an employee in any category as described in (B), (C), or (D) above who has bid and is awarded or assigned an open or reserve line of flying.

(F) The terms "base" and "domicile" are synonymous and shall be used within this Agreement to refer to a specific location where the pilots are stationed.

MEMORANDUM OF AGREEMENT

With reference to those employees whose names are marked by an asterisk (*) on the System Seniority List (Grandfather Rights) as provided in Section 2(F) of the Agreement dated 11/9/65 and Section 11 of the PNA Agreement effective 6/1/66, the parties hereto agree to the following procedure:

1. At the time the Company no longer operates propeller type aircraft required by FAA to be operated with a flight deck crew, which includes a Second Officer, any pilot referred to above who does not qualify for assignment to turbo jet aircraft may be terminated by the Company.

2. Any pilot referred to above who qualifies for assignment to turbo jet aircraft, but who is unable to upgrade in his proper turn to First Officer or Captain, will nevertheless have the right to qualify and fly as a Second Officer, provided he maintains the necessary standards of proficiency. A pilot who cannot qualify as a Second Officer may be terminated by the Company.

3. In the event the Company discontinues the operation of propeller equipment at a base(s) where the above-referred to employees are based, but are nevertheless operating propeller equipment at another base(s) and such employee is not qualified on turbo jet aircraft, such employee may select in accordance with his seniority a base at which the propeller aircraft are operated and will be entitled to moving expenses as set forth in Section 15 of the basic Agreement.

IN WITNESS WHEREOF, the parties hereto have signed this Memorandum of Agreement this 26th day of October, 1967.

WITNESSES:	FOR WESTERN AIR LINES, INC.
/s/ Dan A. Zaich	/s/ Terrell S. Shrader
	TERRELL S. SHRADER
/s/ Donald S. Pravzich	Vice President-Industrial Relations
/s/ J. W. Stone	/s/ Harold W. Caward
	HAROLD W. CAWARD
/s/ D. DeShazo	Vice President-Flight Operations
WITNESSES:	FOR THE AIR LINE PILOTS IN THE SERVICE OF WESTERN AIR LINES, INC.
/s/ Joseph A. Swan	/s/ Charles H. Ruby
	CHARLES H. RUBY, President
/s/ Lawrence R. Ball	Air Line Pilots Association, International
/s/ R. L. Butler	

PLAINTIFFS' EXHIBIT 177

[September 1, 1977]

AGREEMENT

Between

WESTERN AIR LINES, INC.

And

THE AIR LINE PILOTS

In The Service Of

WESTERN AIR LINES, INC.

As Represented By

THE AIR LINE PILOTS ASSOCIATION

INTERNATIONAL

SEPTEMBER 1, 1977

SECTION 24

PHYSICAL EXAMINATIONS

(A) Medical standards for Company medical examinations of pilots who have completed their probationary period will be no more restrictive than those standards set forth in the Federal Aviation Regulations, including the waiver and exemption policy of the FAA, as being required to maintain a First Class Airman Medical Certificate for airline pilots. Any pilot hereunder who fails to pass a Company medical examination may, at his option, have a review of his case in the following manner:

1. He may employ a qualified medical examiner of his own choosing and at his own expense for the purpose of conducting a medical examination for the same purpose as the medical examination made by the medical examiner employed by the Company.

2. A copy of the findings of the medical examiner chosen by the employee shall be furnished to the Company, and in the event that such findings verify the findings of the medical examiner employed by the Company, no further medical review of the case shall be afforded.

3. In the event that the findings of the medical examiner chosen by the employee shall disagree with the findings of the medical examiner employed by the Company, the Company will, at the written request of the employee, ask that the two (2) medical examiners agree upon and appoint a third (3rd) qualified and disinterested medical examiner, preferably a specialist, for the purpose of making a further medical examination of the employee.

4. The said disinterested medical examiner shall then make a further examination of the pilot in question and the case shall be settled on the basis of his findings.

(B) The expense of employing the disinterested medical examiner shall be borne one-half (½) by the pilot and one-half (½) by the Company; copies of such medical examiner's report shall be furnished to the Company and to the pilot.

(C) In cases where the Company on its own initiative removes a pilot from the payroll, not including cases where the pilot places himself on sick leave or the pilot fails to pass an FAA Medical Examination, and the disinterested medical examiner determines the pilot has at all times continuously met the Company medical standards as set forth in Paragraph (A) of this Section, such pilot shall be compensated for loss of earnings, less sick leave paid, and in such cases any deduction from his sick leave accrual will be restored.

(D) In the event a pilot who previously was able to maintain a First Class Airman Medical Certificate becomes unable to do so but is able to meet the medical standards established by the Federal Aviation Regulations, including the waiver and exemption policy of the FAA, for pilots serving as Flight Engineers, then he shall be utilized as a Second Officer in the second officer category to which he elects to bid or bump and in which he is medically qualified to fly. The procedures of Paragraph (A) of this Section may be utilized by the pilot in the event of any dispute arising under this Paragraph (D).

PLAINTIFFS' EXHIBIT 5

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV-78-2184-MML

CHARLES G. CRISWELL, ALBERT RON,
RULON H. STARLEY,
Plaintiffs,

vs.

WESTERN AIR LINES, INC.,
Defendant.

DEFENDANT'S RESPONSES TO REQUESTS FOR ADMISSION

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, Defendants respond to Plaintiff's request as follows:

REQUEST NO. 1:

Of the four Western pilots (B.M. Holt, J.L. Hilbert, E. H. Hoyt, and G. L. Coppess) who could not meet FAA medical requirements necessary to hold pilot positions and who were retained by Western as Second Officers, none again progressed beyond the Second Officer position.

RESPONSE TO REQUEST NO. 1:

Defendant admits that E. H. Hoyt and J. L. Hilbert did not progress beyond Second Officer after being permitted to fly with Second-Class medicals pursuant to Section 24(D) of the pilot agreement. Hoyt is deceased and Hilbert received a disability retirement in October, 1979.

Holt and Coppess are still flying as Second Officers for Western pursuant to Section 24(D).

REQUEST NO. 2:

B. M. Holt remains employed by Western in the position of Second Officer.

RESPONSE TO REQUEST NO. 2:

Defendant admits that B. M. Holt remains employed by Western in the position of Second Officer.

REQUEST NO. 3:

J. L. Hilbert remains employed by Western in the position of Second Officer.

RESPONSE TO REQUEST NO. 3:

Defendant denies that J. L. Hilbert remains employed by Western in the position of Second Officer. Defendant alleges that J. L. Hilbert took a disability retirement effective October of 1979.

REQUEST NO. 4:

G. L. Coppess remains employed by Western in the position of Second Officer.

RESPONSE TO REQUEST NO. 4:

Defendant admits that G. L. Coppess remains employed by Western in the position of Second Officer.

REQUEST NO. 5:

During the time of their medical disabilities, J. L. Hilbert and G. L. Coppess were employed by Western in non-pilot, non-cockpit positions.

RESPONSE TO REQUEST NO. 5:

Defendant admits that during the time of their medical disabilities, J. L. Hilbert and G. L. Coppess were employed by Western in non-pilot, non-cockpit positions.

REQUEST NO. 6:

From September 1968 to September 1973, Western classified the Second Officer position on the DC-10, B-707/720, and B-727 as higher than one or more First Officer positions on other types of equipment.

RESPONSE TO REQUEST NO. 6:

Defendant admits that from September 1968 to September 1973, Western classified the Second Officer position on the DC-10, B-707/720, and B-727 as higher than one or more First Officer positions on other types of equipment as it applies to base-bid categories.

REQUEST NO. 7:

From September 1968 to September 1973, Western pilots were authorized to move from First Officer to higher classified Second Officer positions.

RESPONSE TO REQUEST NO. 7:

Defendant admits that from September 1968 to September 1973, Western pilots were authorized to move from First Officer to higher classified Second Officer positions as it applies to base-bid categories.

REQUEST NO. 8:

Prior to September 1968, Western pilots—with the exception of the career Second Officers—bid only for Captain or First Officer positions. Approximately two-thirds of the pilot seniority, and the remaining pilots were assigned by Western to First Officer or Second Officer

duties on a monthly basis. During this time, many pilots alternated between First Officer and Second Officer duties on a monthly basis.

RESPONSE TO REQUEST NO. 8:

Defendant admits that prior to September 1968, Western pilots—with the exception of the career Second Officers—bid only for Captain or First Officer positions. Approximately two-thirds of the pilot seniority list held base bid Captain or First Officer positions based on seniority, and the remaining pilots were assigned by Western to First Officer or Second Officer duties on a monthly basis. During this time, many pilots alternated between First Officer and Second Officer duties on a monthly basis, although pilots were often qualified on more than one aircraft at one time.

REQUEST NO. 9:

All or substantially all of the 130 pilots listed in the August 16, 1979 affidavit of counsel for plaintiffs flew as Second Officers prior to September 1968 after having flown as Captains or First Officers.

RESPONSE TO REQUEST NO. 9:

Defendant admits that all of substantially all of the 130 pilots listed in the August 16, 1979 affidavit of counsel for plaintiffs flew as Second Officers prior to September 1968 after having flown as Captains or First Officers with the exception that this occurred prior to 1963 for the most part. This assignment may have lasted for no more than several weeks or months.

REQUEST NO. 10:

Since 1971 numerous Western pilots have exercised "widebody downbid" rights.

RESPONSE TO REQUEST NO. 10:

Defendant admits that since 1971 numerous Western pilots have exercised "widebody downbid" rights.

REQUEST NO. 11:

Pilots are permitted to exercise these "widebody downbid" rights more than once in their careers.

RESPONSE TO REQUEST NO. 11:

Defendant admits that under the 1977 Pilot Agreement pilots were permitted to exercise these "widebody downbid" rights more than once in their careers.

REQUEST NO. 14:

Western pilots are not required to upgrade to the next higher status if the upgrading would require or result in (a) a loss of pay, (b) a reserve assignment in the higher status, or (c) a change of domicile.

RESPONSE TO REQUEST NO. 14:

Defendant admits that Western pilots are not required to upgrade to the next higher status if the upgrading would require or result in (a) a loss of pay, (b) a reserve assignment in the higher status, or (c) a change of domicile, subject to the provisions of Section 10(c)3.c. of the Pilot Agreement.

REQUEST NO. 16:

Especially in bases where Western maintains only one type of equipment (Honolulu (DC-10), Denver (B-737), and Minneapolis (B-727)), First Officers are at times trained to fly as Captains and do so on a temporary basis, after which time they resume flying as First Officers.

RESPONSE TO REQUEST NO. 16:

Defendant admits that especially in bases where Western maintains only one type of equipment (Honolulu (DC-10), Denver (B-737), and Minneapolis (B-727)), First Officers are at times trained to fly as Captains and do so on a temporary basis, after which time they resume flying as First Officers.

REQUEST NO. 17:

Until 1977, numerous Western pilots who received "widebody downbids" "bid out" of the DC-10 position before it was activated, and in this manner were able to downbid to a lower position on non-widebody equipment (e.g., B-737 First Officer to B-707/720 Second Officer) or exercise downbids within status.

RESPONSE TO REQUEST NO. 17:

Defendant admits that until 1977, numerous Western pilots who received "widebody downbids" "bid out" of the DC-10 position before it was activated, and in this manner were able to downbid to a lower position on non-widebody equipment (e.g., B-737 First Officer to B-707/720 Second Officer) or exercise downbids within status.

REQUEST NO. 18:

Western's training and operations records do not contain every instance in which Western pilots worked as First Officers or Second Officers after having worked in the respective higher positions of Captain or First Officer.

RESPONSE TO REQUEST NO. 18:

Defendant admits that prior to 1974 Western's training and operations records do not contain every instance in which Western pilots worked as First Officers or Second Officers after having worked in the respective higher

positions of Captain or First Officer. However, this information would be in pilot personnel files after 1970.

REQUEST NO. 19:

In 1978 Western hired 61 new pilots, all of whom began their service with Western in the position of Second Officer. Twelve new pilots were hired in each of the months of June through September 1978, and thirteen were hired in November 1978.

RESPONSE TO REQUEST NO. 19:

Defendant admits that in 1978 Western hired 61 new pilots, all of whom began their service with Western in the position of Second Officer. Twelve new pilots were hired in each of the months of June through September 1978, and thirteen were hired in November 1978.

REQUEST NO. 20:

The Western Second Officers who are older and highest on the seniority list are often those assigned to Western's most sophisticated and largest aircraft, such as the DC-10.

RESPONSE TO REQUEST NO. 20:

Defendant admits that the Western Second Officers who are older and highest on the seniority list are often those assigned to Western's most sophisticated and largest aircraft, such as the DC-10.

Dated: November 20, 1979.

DARLING, HALL, RAE & GUTE

/s/ Paul L. Giannini
PAUL L. GIANNINI
Attorneys for Defendant,
Western Air Lines, Inc.

VERIFICATION

STATE OF CALIFORNIA, COUNTY OF

I, the undersigned, say:

I have read the foregoing Defendant's Responses to Plaintiffs' Interrogatories (Third Set) and know its contents.

☒ CHECK APPLICABLE PARAGRAPH

☐ I am a party to this action. The matters stated in it are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☒ I am ☒ an officer ☐ a ——— partner ☐ a ——— of WESTERN AIR LINES INC. a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. I am informed and believe and on that ground allege that the matters stated in it are true.

☐ I am one of the attorneys for ———, a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in it are true.

Executed on November 20, 1979, at Los Angeles, California.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Thomas J. Greene
(Signature)
THOMAS J. GREENE
Assistant Vice President
Corporate Law

ACKNOWLEDGMENT OF RECEIPT OF DOCUMENT

(other than summons and complaint)

Received copy of above document on ——— 19—.

_____
(Signature)

Attorney for ———

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF
LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 523 W. Sixth Street, Los Angeles, California.

On November 1979, I served the foregoing document described as Defendant's Responses to Plaintiffs' Interrogatories (Third Set) on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at: Los Angeles, California addressed as follows:

Raymond C. Fay
HALEY, BADER & POTTS
77 W. Washington St., #1616
Chicago, Illinois 60602

Designated Local Counsel:
FRED T. RAGSDALE
920 South Robertson Blvd.
Los Angeles, CA 90035

Executed on November 20, 1979 at Los Angeles, California.

(check applicable paragraph below)

☐ (State) I declare under penalty of perjury that the above is true and correct.

☒ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

PLAINTIFFS' EXHIBIT 8

WESTERN AIRLINES

February 13, 1978

Mr. Albert Ron
2987 Peaceful Glen Road
Vacaville, California 95688

Dear Mr. Ron:

We have carefully examined your request to be allowed to continue as a cockpit crew member for Western Airlines in the capacity of a DC-10 Second Officer beyond the normal retirement date of age 60.

It is our considered judgment after examining all of the applicable statutory law that since you have been a member of our Pilot retirement plan, that we cannot continue your employment beyond the normal retirement date of age 60.

It is our opinion that the California statutes dealing with age discrimination allow a Company two years in which to change present policy and amend retirement plans to conform to the age retirement dictates contained therein.

Therefore, your participation in our bonafide retirement plan excludes you from the ordinary workings of these statutes and you must therefore retire according to the mandatory age as set forth in our plan.

We hope that you will understand that our position is not arbitrary but is the result of a careful analysis of the law and our continued desire to operate within the mandates of our legally constituted retirement plans.

Very truly yours,

/s/ William E. Newell
WILLIAM E. NEWELL
Director—Flight

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

cc: R. V. Johnson
B. W. Solow
J. V. Lake

PLAINTIFFS' EXHIBIT 14

WESTERN AIRLINES

February 13, 1978

Captain R. H. Starley
1405 E. Vegas Valley Drive, 147
Las Vegas, Nevada 89119

Dear Captain Starley:

We have carefully examined your request to be allowed to continue as a cockpit crew member for Western Airlines in the capacity of a DC-10 Second Officer beyond the normal retirement date of age 60.

It is our considered judgment after examining all of the applicable statutory law that since you have been a member of our Pilot retirement plan, that we cannot continue your employment beyond the normal retirement date of age 60.

It is our opinion that both the California and Hawaii statutes dealing with age discrimination allow a Company two years in which to change present policy and amend retirement plans to conform to the age retirement dictates contained therein.

Therefore, your participation in our bonafide retirement plan excludes you from the ordinary workings of these statutes and you must therefore retire according to the mandatory age as set forth in our plan.

We hope that you will understand that our position is not arbitrary but is the result of a careful analysis of the law and our continued desire to operate within the mandates of our legally constituted retirement plans.

Very truly yours,

/s/ William E. Newell
WILLIAM E. NEWELL
Director—Flight

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

cc: R. V. Johnson
B. W. Solow
J. V. Lake
S. M. Oberg

PLAINTIFFS' EXHIBIT 28

APPENDIX "A" *

Name:	Date of Discovery Response:	Former Position ** and dates:	Subsequent Position and Dates:	Circumstances:
1. C.A. Miner	10/9/78	FO (see 12/1/73 letter of agreement	SO, 3/23/72 to present	"could not meet the technical requirements for Captain."
2. C.A. Jeffery	"	"	SO, 12/22/72 to present	"
3. L.A. Niefert	"	"	SO, 3/18/74 to present	"
4. G.B. Stringham	"	"	SO, 5/25/74 to present	"
5. C.R. Gundlach	"	"	SO, 9/27/73 to present	"
6. Al White	1/9/79	FO	SO, 10/26/67 to present	"failed to qualify as Captain"
7. B.M. Holt	"	DC-10 CA to 3/31/76	DC-10 SO, 8/10/77 to present	Unable to meet FAA medical requirements
8. J.L. Hilbert	"	707/720 CA to 3/1/71	DC-10 SO, 5/2/77 to present	"
9. C.G. Detrick	"	737 CA	SO, 1/14/69 to present (now DC-10 SO)	"Unable to make the transition to jet aircraft"

* Appendix A lists instances in which Western pilots worked in the position of First Officer after having worked as Captain, or worked in the position of Second Officer after having worked as Captain or First Officer. (Applicable to service in the downbid positions which commenced or continued after 1972.)

** CA = Captain; FO = First Officer; SO = Second Officer.

No.	Name	Former Position	Subsequent Position and Dates	Present Position
10	Birch	737 FO	DC10 SO 6/16/72-1/26/73	727 Capt.
11	Walker	737 FO	DC10 SO 6/16/72-5/31/73	727 Capt.
12	Stoltzfus	737 FO	DC10 SO 6/16/72- *	737 Capt.
13	Koster	737 CA	DC10 FO 6/16/72-5/31/73	707 Capt.
14	Maguire	727 CA	DC10 FO 6/16/72-6/30/73	DC10 Capt.
15	Baker	707 CA	DC10 FO 6/16/72-6/30/73	DC10 Capt.
16	Melton	727 FO	DC10 SO 7/1/75-7/1/77	DC10 FO
17	Lipscomb	737 FO	DC10 SO 7/1/75-10/9/75	DC10 FO
18	Carney	707 FO	DC10 SO 7/1/75- *	727 Capt.
19	Saporito	707 CA	DC10 FO 7/1/75- *	727 Capt.
20	Mason	737 CA	DC10 FO 7/1/75-9/31/76	727 Capt.
21	Chapman	737 CA	DC10 FO 7/1/75-12/1/76	DC10 Capt.
22	Kirk	737 CA	DC10 FO 7/1/75-12/1/77	DC10 Capt.
23	Castle	707 SO	727 SO 7/1/75-3/17/78	737 FO ‡
24	Gibbs	707 FO	DC10 SO 8/1/76-9/1/76	727 Capt.
25	Fields	737 FO	DC10 SO 8/1/76-11/3/78	DC10 FO
26	Stamps	707 FO	DC10 SO 8/1/76-6/1/78	737 Capt.
27	Robertson	727 FO	DC10 SO 8/1/76-12/1/77	727 FO
28	Goggin	727 FO	DC10 SO 8/1/76-3/1/78	DC10 FO
29	Luker	707 FO	DC10 SO 8/1/76-9/1/76	DC10 FO
30	McCallum	737 FO	DC10 SO 8/1/76-10/31/78	DC10 FO
31	Thorn	727 CA	DC10 FO 8/1/76- *	727 Capt.
32	Sobota	737 CA	DC10 FO 8/1/76-10/31/77	DC10 Capt.
33	Records	737 CA	DC10 FO 8/1/76- *	727 Capt.
34	Koster	720 CA	DC10 FO 8/1/76-10/31/76	707 Capt.
35	Malone	727 CA	DC10 FO 8/1/76- *	727 Capt.
36	Boyle	737 CA	DC10 FO 8/1/76-12/1/76	727 Capt.
37	Bassham	737 CA	DC10 FO 8/1/76-4/30/76	727 Capt.
38	McMullin	737 FO	DC10 SO 6/1/76-4/30/78	737 FO
39	Norstrom	737 FO	DC10 SO 6/1/76-5/31/79	727 FO
40	Boaz	737 FO	DC10 SO 6/1/76-7/1/79	DC10 FO
41	Bowers	727 CA	DC10 FO 6/1/76- †	——
42	Wooten	737 FO	DC10 SO 7/1/79-Present	——

* Bid to higher category before ever flying in DownBid status

‡ Status DownBid

† Deceased prior to flying in DownBid status

No.	Name	Former Position	Subsequent Position and Dates	Present Position
43	Hoyt	Previously Supplied	Previously Supplied	Deceased
44	Coppess	Previously Supplied	Previously Supplied	DC10 SO
45	Rusk	Previously Supplied	Previously Supplied	707 Capt.
46	Gamble	Previously Supplied	Previously Supplied	707 Capt.
47	Davies	Previously Supplied	Previously Supplied	707 Capt.
48	Misevic	Previously Supplied	Previously Supplied	DC10 Capt.
49	Beck	Previously Supplied	Previously Supplied	DC10 FO
50	Robinson	Previously Supplied	Previously Supplied	727 Capt.
51	Thompson	Previously Supplied	Previously Supplied	727 Capt.
52	Ritmire	Previously Supplied	Previously Supplied	727 Capt.
53	Kisla	Previously Supplied	Previously Supplied	737 FO
54	Avary	Previously Supplied	Previously Supplied	727 FO
55	O'Brien	Previously Supplied	Previously Supplied	727 FO
56	Zinn	Previously Supplied	Previously Supplied	DC10 FO
57	Woodrow	Previously Supplied	Previously Supplied	DC10 FO
58	McDole	Previously Supplied	Previously Supplied	707 FO
59	Thomas	Previously Supplied	Previously Supplied	707 SO
60	Horton	Previously Supplied	Previously Supplied	707 SO
61	DeVaney	Previously Supplied	Previously Supplied	727 FO
62	Helker	Previously Supplied	Previously Supplied	DC10 Capt.
63	Reiaser	Previously Supplied	Previously Supplied	Deceased
64	Rajala	Previously Supplied	Previously Supplied	DC10 FO
65	Gooch	Previously Supplied	Previously Supplied	DC10 FO
66	Hitchcock	Previously Supplied	Previously Supplied	707 FO
67	Jones	Previously Supplied	Previously Supplied	737 Capt.
68	Will	Previously Supplied	Previously Supplied	DC10 FO

Name:	Date of Discovery Responses:	Former Position and Dates:	Subsequent Position and Dates:	Circumstances:
69. J.W. Lipscomb (#17)	R. Mitchell Dep., pp. 82-85	737 FO	707/720 SO, 11/74-5/75	"bid out" of widebody downbid, see J. Lipscomb declaration, 8/13/79)
70. D.N. Boschetto	R. Mitchell Dep., pp. 67-68	737 FO	DC-10 SO, 5/1/79-present	widebody downbid
71. L.G. Ferguson	R. Mitchell dep., pp. 100-101	737 CA	737 FO, 8/79-present	"punishment"
72. J.B. Taylor	8/31/79	727 FO	DC-10 SO, 5/1/79-present	widebody downbid
73. W.S. Cook	"	727 FO, 12/76 to 4/79	DC-10 SO, 5/1/79-present	"

APPENDIX A

# 74	H.C. Baker	707/720 Capt.	1972	DC-10 F/O	6/16/73	W.B.D.B.
# 75	R.C. Barger	737 Capt.	8/73-6/75	DC-10 F/O	7/75-9/76	Disp.
# 76	S.J. Barinka	737 Capt.	5/73-7/73	707/720 F/O	7/73-6/75	Disp.
# 77	S.J. Barinka	737 Capt.	7/75-3/76	DC-10 F/O	3/76-12/76	Disp.
# 78	L. Barnum	707/720 F/O	7/75-8/75	DC-10 S/O	9/75-12/76	B.B.C.
# 79	B.B. Barrett	707/720 S/O	-7/75	727 F/O	7/75	B.B.C.
# 80	G.A. Barrett	737 Capt.	10/73-7/75	DC-10 F/O	7/75-10/75	Disp.
# 81	H.W. Bassham	737 Capt.	4/73-1/74	DC-10 F/O	1/74-1/74	Disp.
# 82	D.R. Beal	DC-10 S/O	1/79-7/79	727 F/O	7/79-Present	——
# 83	N.J. Bender	707/720 F/O	4/77	DC-10 S/O	4/77-5/78	Disp.
# 84	T.W. Blair	707/720 F/O	-1972	707/720 S/O	7/72-1/73	I.B.
# 85	A. Blake	707/720 Capt.	5/73-6/74	727 F/O	6/74-2/75	Disp.
# 86	J.D. Broyton	707/720 Capt.	8/73-6/74	727 F/O	6/74-11/74	Disp.
# 87	P.A. Cardinale	707/720 F/O	6/73-1/74	707/720 S/O	1/74-6/74	Disp.
# 88	G.D. Clark	707/720 F/O	1972-3/73	737 F/O	4/73-9/74	Status D
# 89	G.D. Clark	727 F/O	10/74- Death 1978			——
# 90	T.J. Colette	737 Capt.	1/73-7/74	DC-10 F/O	8/74-10/75	Disp.
# 91	T.P. Crawford	737 F/O	1/74-1/74	707/720 S/O	1/74-6/74	Disp.
# 92	C.A. Ellmore	737 F/O	12/76/78	DC-10 S/O	6/78-Present	W.B.D.B.
# 93	B.M. Elsner	737 Capt.	5/73-5/73	707 F/O	-11/74	Disp.
# 94	M.J. Farber	707/720 F/O	4/73-1/74	707/720 S/O	1/74-9/78	Disp.
# 95	R.G. Gilbert	737 Capt.	1972	707/720 S/O	7/72-6/74	Disp.
# 96	T.G. Goldt	737 F/O	7/75	707/720 S/O	8/75-4/79	Disp.
# 97	R.M. Graff	727 S/O	7/77	Present		——
# 98	L.A. Grippo	727 Capt.	4/73-8/73	DC-10 F/O	8/74-11/76	Disp.
# 99	M.E. Hammon	737 F/O	1/74-1/74	707/720 S/O	1/74-1/74	Disp.
#100	H.A. Hazen	737 Capt.	1/73-5/74	DC-10 F/O	6/74-11/76	Disp.

#101	B.F. Holloway	727 Capt.	12/76-	Present		——
#102	P.H. Johannes	707/720 F/O	1972	707/720 S/O	7/73-10/74	Disp.
#103	D.A. Johnson	737 F/O	6/74-10/74	737 S/O	10/74-11/76	Disp.
#104	H.B. Johnson	707/720 F/O	1/73-1/74	DC-10 S/O	1/74-1/74	Disp.
#105	A.A. Lopez	727 F/O	12/77-	Not Activated	Reverts to 727 S/O	——
#106	J.G. Louden	707/720 F/O	6/73-1/74	707/720 S/O	1/74-9/76	Disp.
#107	L.W. Lowenberg	707/720 F/O	7/77	DC-10 S/O	3/78-7/79	Disp.
#108	C.R. McDonald	707/720 F/O	5/73-1/74	DC-10 S/O	1/74-12/76	Disp.
#109	L.J. McDonnell	707/720 F/O	7/73-1/74	727 S/O	6/74-5/76	Disp.
#110	E.H. McDugald	737 Capt.	4/73-1/74	DC-10 F/O	1/74-7/76	Disp.
#111	W.A. McGaw	707/720 F/O	11/72-10/73	737 F/O	10/73-10/74	Disp.
#112	M.R. McGee	707/720 F/O	7/76-1/78	DC-10 S/O	1/78-7/78	Disp.
#113	F.J. Maier	707/720 F/O	4/73-2/74	727 S/O	3/74	Disp.
#114	F.S. Marsalis	737 Capt.	7/75	DC-10 F/O		B.B.C.
#115	D.G. Meiners	707/720 F/O	1972	707/720 S/O	7/72-1/73	I.B.
#116	A.T. Meisenholder	737 Capt.	1972	DC-10 F/O	4/72-6/73	Disp.
#117	T.J. Moeller	737 F/O	5/73-6/73	737 S/O	7/73-10/73	Disp.
#118	E.P. Moore	DC-10 F/O	7/75	727 F/O	7/75-3/77	Status
#119	J.R. Mrak	707/720 F/O	5/73-1/74	DC-10 S/O	1/74-7/75	Disp.
#120	D.A. Newell	707/720 Capt.	1/73-6/74	727 F/O	6/74-10/77	Disp.
#121	M.K. Nilsson	737 Capt.	6/73-1/74	DC-10 F/O	1/74-6/74	Disp.
#122	C.T. Nunley	707/720 F/O	1972	707/720 S/O	7/72-4/73	I.B.
#123	A.W. Owens	737 Capt.	7/77-6/78	727 F/O	6/78-7/79	Disp.

#124	J.W. Petit	727 Capt.	1/73-8/74	DC-10 F/O	8/74-11/75	Disp.
#125	J.H. Petty	737 Capt.	1974	DC-10 F/O	7/75-12/76	Disp.
#126	L.R. Redfield	707/720 F/O	3/77-6/78	DC-10 S/O	7/78-7/78	Disp.
#127	C.E. Robinson	737 Capt.	7/73-1/74	DC-10 F/O	1/74-6/74	Disp.
#128	G.J. Rottschafer	707/720 S/O	7/73-6/78	DC-10 F/O	6/78	Hardship Release
#129	E. Saylor	737 Capt.	6/73	DC-10 F/O	1/74-1/74	Disp.
#130	G.K. Smith	737 Capt.	8/73-1/74	737 F/O	1/74-12/75	Disp.
#131	M.J. Stainner	737 Capt.	10/73-6/74	DC-10 F/O	6/74-7/75	Disp.
#132	M.J. Stainner	737 Capt.	7/75-7/75	DC-10 F/O	7/75-10/75	Disp.
#133	J.L. Stamps	707/720 F/O	9/72-	707/720 S/O	7/72-1/73	I.B.
#134	D.A. Sticka	727 F/O	6/73-1/74	707/720 S/O	1/74-6/74	Disp.
#135	J.C. Volkel	737 Capt.	4/73-1/74	727 F/O	1/74-6/74	Disp.
#136	D.R. Waitley	707/720 F/O	7/75	DC-10 S/O	7/75-8/76	B.B.C.
#137	T.M. Wallitner	737 Capt.	7/75	DC-10 F/O	7/75-8/76	B.B.C.
#138	H.E. Will	737 F/O	4/73-1/74	DC-10 S/O	1/74-6/74	Disp.
#139	R.A. Williams	727 Capt.	4/73-1/74	DC-10 F/O	1/74-8/74	Disp.
#140	D.A. Wilson	737 F/O	7/75	737 S/O	7/75-8/75	Disp.
#141	L.N. Woodall	707/720 F/O	7/73-6/74	707/720 S/O	6/74-10/75	Disp.
#142	R.J. Woodrow	707/720 F/O	1972	DC-10 S/O	1972	I.B.
#143	D.B. Zumbrun	737 Capt.	7/73-10/75	DC-10 F/O	10/75-12/76	Disp.

W.B.D.B. = Wide Body Down Bid
Disp. = Displaced from category due to reduction in flying.
B.B.C. = Base Bid Cancellation—bid cancelled prior to activation.
I.B. = Interim Bid—special agreement with ALPA to award interim bid until permanent bid was activated.

APPENDIX B

1.	R.A. Adams	Awarded 727 F/O in error 12/77
2.	P.M. Adkins	Displaced from 707/720 S/O to 727 S/O 5/78
3.	J.L. Allen	Displaced from 707/720 S/O to 737 S/O 6/74
4.	R.J. Allen	707/720 Capt. awarded I.B. 7/72-5/73
5.	A.L. Ambrosia	707/720 Capt. awarded I.B. 7/72-11/72
6.	W.R. Anderson	Displaced from 707/720 S/O to 727 S/O 2/74
7.	D.M. Barber	Displaced from 727 Capt. to 737 Capt. 3/77
8.	D. Bauer	Displaced from 707/720 S/O to 727 S/O 1/79
9.	D.A. Beach	Displaced from 707/720 S/O to 737 S/O (10/74) Displaced from 707/720 S/O to 737 S/O (12/76)
10.	G.R. Beck	707/720 Capt. awarded I.B. 7/72-5/73
11.	J.S. Beitzel	Initial Base Assignment Did Not Carry Base Category Bid. No Bidding Restrictions 9/78
12.	C.M. Bendik	Displaced from 707/720 S/O to 727 S/O 2/74
13.	R.J. Berens	Displaced from 707/720 S/O to 737 S/O 2/74
14.	D.R. Berry	Displaced from 707/720 S/O to 727 S/O 6/78
15.	D.N. Bidleman	Displaced from 707/720 Capt. to 727 Capt. 2/74
16.	W.J. Bird	Displaced from 727 S/O to 737 S/O 6/72
17.	R.B. Blanchard	Displaced from 707/720 F/O to 727 F/O 5/78
18.	A.L. Blaylock	Displaced from 707/720 S/O to 737 S/O 1/74
19.	W.C. Blevins	Displaced from 707/720 S/O to 727 S/O 2/74
20.	J.A. Bodmer	Displaced from 707/720 S/O to 727 S/O 1/74 Displaced from 727 F/O to 737 F/O 2/76 Displaced from 707/720 F/C to 737 F/O 1/78
21.	J.J. Bodnar	Displaced from 707/720 F/O to 727 F/O 5/78 Displaced from 707/720 F/O to 727 F/O 7/79
22.	L. Boswell	Status Down Bid 707/720 S/O to 727 S/O 3/77
23.	T.H. Bothwell	Displaced from 707/720 S/O to 737 S/O 7/78

24.	D.L. Bourland	Status Down Bid DC10 S/O to 707/720 S/O 12/76
25.	R.G. Boyle	Displaced from 727 Capt. to 737 Capt. 3/77
26.	R.C. Bradfield	Status Down Bid from 707/720 S/O to 737 S/O 10/72
27.	R.T. Brees	Displaced from 707/720 Capt. to 727 Capt. 8/78
28.	G.T. Brewer	Initial Base Assignment did not carry Base Category Bid. No Bidding Restrictions 10/78
29.	W.S. Brougher	Displaced from 707/720 S/O to 727 S/0 2/74
30.	R.D. Brown	Displaced from 707/720 F/O to 737 F/O 3/77
31.	R.W. Brumfield	Displaced from 707/720 S/O to 727 S/O 6/74
32.	R.W. Brushwyler	Displaced from 707/720 S/O to 737 S/O 2/74 Displaced from 707/720 S/O to 727 S/O 6/78 Displaced from 707/720 S/O to 727 S/O 11/78
33.	A.L. Buckelew	Displaced from 707/720 Capt. to 727 Capt. 3/77
34.	J.L. Buisson	Initial Base Assignment Did Not Carry Base Category Bid. No Bidding Restrictions 9/78
35.	R.H. Burkland	Displaced from 707/720 S/O to 727 S/O 7/78
36.	J.E. Burns	Displaced from 727 Capt. to 737 Capt. 8/74
37.	L.R. Busby	Displaced from 707/720 S/O to 727 S/O 2/74
38.	J.B. Bush	Displaced from 727 S/O to 737 S/O 3/72
39.	R.V. Butler	Displaced from 707/720 S/O to 727 S/O 5/78
40.	A.R. Bytheway	Status Down Bid 727 Capt. to 737 Capt. 3/76
41.	K.A. Calderon	Displaced from 707/720 S/O to 727 S/O 1/74
42.	D.E. Campbell	Displaced from 707/720 S/O to 727 S/O 1/74
43.	P.A. Cardinale	Displaced from 707/720 F/O to 727 F/O 7/78
44.	A.L. Cartwright	Displaced from 707/720 F/O to 727 F/O 1/78
45.	B.W. Cave	Displaced from 707/720 Capt. to 727 Capt. 8/77
46.	G.V. Chakerian	Status Down Bid 727 F/O to 737 F/O 4/79
47.	E.E. Chandler	Displaced from DC10 F/O to 707/720 F/O 9/75

48. R.M. Chase — 707/720 Capt. awarded 727 Capt. I.B. 7/72-11/72
49. C.J. Cheney — Displaced from 707/720 S/O to 727 S/O 7/78
50. V.W. Cheney — Displaced from 727 F/O to 737 F/O 4/72
51. G.N. Coates — Displaced from 707/720 S/O to 727 S/O 2/74
52. T.J. Colette — Displaced from 707/720 Capt. to 737 Capt. 8/77
53. M.W. Collins — Displaced from 707/720 S/O to 727 S/O 6/74
54. A.A. Connell — Displaced from 707/720 F/O to 727 F/O 7/79
55. B.G. Constable — Displaced from DC10 F/O to 707/720 Capt. 9/75
Status Down Bid 727 Capt. to 737 Capt. 8/77
56. D.H. Courtney — 707/720 F/O awarded I.B. 7/72-5/73
Displaced from 707/720 F/O to 727 F/O
57. R.L. Crawford — Displaced from 727 S/O to 737 S/O
58. C.T. Crawley — Displaced from 727 S/O to 737 S/O 4/74
Status Down Bid 707/720 F/O to 727 F/O 9/77
59. G.J. Creech — Displaced from 707/720 S/O to 727 S/O 1/74
Displaced from 707/720 F/O to 727 F/O 10/77
60. W.J. Creeden — Status Down Bid 707/720 S/O to 727 S/O 6/74
61. B.J. Crider — B.B.C. DC10 S/O 12/76
Displaced from 707/720 S/O to 727 S/O 3/78
62. D.E. Davies — Displaced from 707/720 Capt. to 727 Capt. 7/78
Displaced from 707/720 Capt. to 727 Capt. 9/79
63. P.H. Davies — Displaced from 707/720 F/O to 727 F/O 1/77
Displaced from 707/720 F/O to 727 F/O 7/79
64. C.A. Davis — Displaced from 707/720 Capt. to 727 Capt. 6/74
Displaced from 707/720 Capt. to 727 Capt. 7/79
65. E.H. Davis — Displaced from 727 S/O to 737 S/O 3/72
Displaced from 707/720 F/O to 727 F/O 7/78
66. P.K. Davis — Status Down Bid 727 F/O to 737 F/O 4/72
67. R.P. Deakers — Displaced from 707/720 S/O to 727 S/O 1/78

68. A.E. Dean — Displaced from 707/720 Capt. to 727 Capt. 8/78
69. R.A. Deeds — Displaced from 707/720 Capt. to 737 Capt. 12/77
70. P.F. DeGrasse — 707/720 Capt. awarded I.B. 9/72-5/73
Displaced from 707/720 Capt. to 727 Capt. 7/78
Displaced from 707/720 Capt. to 727 Capt. 10/79
71. L.C. Delzer — Displaced from 707/720 F/O to 727 F/O 7/79
72. C.S. Dent — Displaced from 707/720 Capt. to 727 Capt. 1/74
73. D.T. DeVaney — Displaced from 707/720 F/O to 727 F/O 7/79
74. R.W. DeVaney — Initial Base Assignment Did Not Carry Base Category Bid. No Bidding Restrictions 3/77
75. L.N. DeWitt — Status Down Bid 707/720 Capt. to 727 Capt. 12/76
76. L.E. Dishon — Displaced from DC-10 S/O to 727 S/O 7/73
77. R.T. Dixon — Displaced from 707/720 F/O to 727 F/O 3/77
78. F.A. Doherty — Displaced from 707/720 S/O to 737 S/O 6/74
79. W.D. Doiron — Displaced from 707/720 S/O to 727 S/O 10/77
80. D.J. Dolan — Displaced from 707/720 S/O to 727 S/O 12/77
81. E.J. Donovan — Displaced from 707/720 Capt. to 727 Capt. 1/74
B.B.C. of 707/720 Capt. to 727 Capt. 10/75
82. G.T. Dort — Displaced from 707/720 S/O to 727 S/O 12/77
83. F.G. Dosher — Status Down Bid 707/720 F/O to 727 F/O 12/76
84. C.T. Douglass — Displaced from 707/720 S/O to 727 S/O 1/74
Displaced from DC-10 S/O to 707/720 S/O 9/75
85. L.R. Dowell — Displaced from 707/720 S/O to 737 S/O 1/74
Base Bid Release From 727 S/O 7/75
86. M.J. Doyle — Displaced from 707/720 F/O to 727 F/O 3/77
87. L.V. Drain — Displaced from 707/720 Capt. to 737 Capt. 1/74
Displaced from 707/720 Capt. to 727 Capt. 9/77
88. D.D. Dressler — Displaced from 707/720 S/O to 727 S/O 7/78

89. E.D. Dunn — Status Down Bid 727 F/O to 737 F/O 5/73
90. H.E. Dutton — Status Down Bid 707/720 Capt. to 737 Capt. 11/72
91. D.E. Ebrite — Displaced from DC-10 S/O to 727 F/O 1/74
92. R.A. Edson — Displaced from 707/720 S/O to 737 S/O 12/73
93. M.R. Edwards — Displaced from 707-720 Capt. to 727 Capt. 1/74
94. J.S. Ehmer — B.B.C. 707/720 S/O to 737 S/O 9/75
95. T.B. Ehnert — B.B. Trade 707/720 S/O to DC-10 S/O 7/77
96. R.A. Elin — Displaced from 707/720 F/O to 727 F/O 8/77
97. R.P. Elliot — B.B.C. DC-10 Capt. to 707/720 Capt. 9/75
98. J.O. Elmore — Displaced from 707/720 F/O to 727 F/O 6/74
99. D.A. Engel — 707/720 F/O Awarded I.B. 727 F/O 7/72-10/72
Released from 727 Capt. 7/79
100. W.T. Erwin — Displaced from 707/720 S/O to 737 S/O 12/73
101. E.R. Euler — Displaced from 707/720 Capt. to 727 Capt. 2/74
102. S.C. Evans — Status Down Bid 707/720 F/O to 727 F/O 12/76
103. T.F. Evans — Displaced from 707/720 Capt. to 727 Capt. 1/72
104. R.J. Farrell — B.B.C. from 707/720 Capt. to 727 Capt. 3/77
105. V.C. Fey — Displaced from 707/720 Capt. to 727 Capt. 6/74
Displaced from 707/720 Capt. to 727 Capt. 4/79
106. T.P. Fischer — Displaced from 727 F/O to 737 F/O 2/74
Displaced from 707/720 F/O to 727 F/O 5/78
107. P.J. Fisher — Displaced from 707/720 Capt. to 727 Capt. 6/74
Displaced from 707/720 Capt. to 727 Capt. 4/79
108. S. Fletcher — Displaced from 707/720 S/O to 727 S/O 6/78
109. M.A. Flynn — Displaced from 707/720 Capt. to 727 Capt. 12/77
110. T.L. Forster — 707/720 F/O Awarded I.B. 727 F/O 7/72-9/72
Released from 727 Capt. 7/79
111. N.S. Foster — Displaced from DC-10 Capt. to 707/720 Capt. 6/76

112. A.H. Fowler — Displaced from 707/720 S/O to 737 S/O 9/77
113. B.B. Fox — Displaced from 707/720 Capt. to 727 Capt. 7/78
114. S.K. Franks — Displaced from 707/720 F/O to 737 F/O 7/78
Displaced from 707/720 F/O to 737 F/O 7/79
115. R.M. Frick — Displaced from 727 F/O to 737 F/O 9/75
116. J.P. Friedlund — Displaced from 707/720 S/O to 727 S/O 2/74
117. A.R. Frye — Status Down Bid 707/720 Capt. to 727 Capt. 11/73
118. J.P. Gallagher — Displaced from DC-10 S/O to 707/720 S/O 2/74
119. F. Gamble — Displaced from 707/720 Capt. to 737 Capt. 2/74
Displaced from 707/720 Capt. to DC-10 F/O 11/75
Displaced from 707/720 Capt. to 727 Capt. 10/77
Displaced from 707/720 Capt. to 727 Capt. 9/79
120. E.R. Ganoung — Displaced from 707/720 F/O to 737 F/O 1/78
121. H.W. Gardner — Displaced from 707/720 S/O to 727 S/O 2/74
122. D.F. Gearhart — Status Down Bid 707/720 F/O to 737 F/O 7/73
123. G.G. Gebo — Displaced from 707/720 F/O to 737 F/O 3/74
124. H. Geissler — Displaced from 707/720 S/O to 727 S/O 6/74
125. D.J. Gibbons — Displaced from 707/720 Capt. to 727 Capt. 3/77
126. C.P. Gilmore — B.B.C. 707/720 S/O to 727 S/O 7/79
127. W.G. Givens — Displaced from DC-10 S/O to 707/720 S/O 8/74
Displaced from 707/720 F/O to 727 F/O 1/78
128. R.L. Goggin — Displaced from 707/720 F/O to 727 F/O 5/75
Status Down Bid DC-10 S/O to 707/720 S/O 10/76
129. D.M. Gonzales — Displaced from 707/720 S/O to 737 S/O 1/77
130. J.M. Gonzales — Displaced from 707/720 S/O to 737 S/O 10/77

131. F.R. Gooch — Status Down Bid DC-10 S/O to 727 S/O 5/78
132. F.G. Gordon — Displaced from 727 S/O to 737 S/O 3/72
133. E.G. Gost — Displaced from 707/720 S/O to 727 S/O 1/74
Displaced from 707/720 F/O to 727 F/O 10/77
134. J.B. Grower — B.B.C. 707/720 Capt. to 727 Capt. 7/75
135. B.K. Grammer — Base Bid Trade 707/720 S/O to 737 S/O 12/72
136. J.T. Graue — Displaced from 707/720 S/O to 737 S/O 12/73
137. M.L. Gray — Displaced from 707/720 S/O to 737 S/O 2/74
138. L.A. Grippo — Displaced from 707/720 Capt. to 727 Capt. 9/77
139. D.R. Grose — Displaced from 707/720 S/O to 727 S/O 7/78
140. F.M. Guennel — Displaced from 707/720 S/O to 727 S/O 2/74
141. G.S. Guerrero — Displaced from 707/720 S/O to 727 S/O 7/79
142. G.L. Guilliat — 707/720 Capt. Awarded I.B. 7/72-6/73
Displaced from 707/720 Capt. to 727 Capt. 3/74
Displaced from 707/720 Capt. to 727 Capt. 1/77
143. L.A. Guiton — 707/720 Capt. Awarded I.B. 7/72-6/73
144. J.F. Gulledge — Displaced from DC-10 S/O to 707/720 S/O 2/74
Displaced from 707/720 F/O to 727 F/O 11/78
145. R.E. Gullickson — Displaced from 707/720 Capt. to 737 Capt. 3/74
Displaced from 707/720 Capt. to 727 Capt. 1/78
146. R.M. Gunnell — Displaced from 707/720 Capt. to 727 Capt. 12/77
147. R.C. Gustaveson — B.B.C. from 707/720 S/O to 737 S/O 7/75
148. T.J. Haas — Displaced from 707/720 S/O to 737 S/O 2/74
149. R.D. Halcomb — Displaced from 707/720 S/O to 727 S/O 5/78
150. J.R. Haley — Status Down Bid 727 F/O to 737 F/O 12/78
151. E.M. Hall — Displaced from 707/720 S/O to 727 S/O 2/74
152. D.R. Hallock — Status Down Bid 727 Capt. to 737 Capt. 6/72

153. C.J. Hallsman — 707/720 Capt. Awarded I.B. 7/72 to 6/73
154. T.W. Hanley — Displaced from 707/720 Capt. to 727 Capt. 6/74
155. F. Hansen — Displaced from 707/720 Capt. to 727 Capt. 4/78
156. H.A. Hazen — Displaced from 707/720 Capt. to 727 Capt. 10/77
157. R.P. Herriott — Displaced from 707/720 S/O to 727 S/O 1/78
158. G.F. Hicks — Displaced from 707/720 S/O to 727 S/O 1/74
159. M.S. Hillman — Displaced from 707/720 S/O to 727 S/O 2/74
Status Down Bid 707/720 S/O to 727 S/O 9/74
160. J.B. Hoover — Status Down Bid 707/720 F/O to 737 F/O 8/76
161. D.K. Hopkins — Displaced from 707-720 Capt. to 727 Capt. 5/78
Status Down Bid 727 Capt. to 737 Capt. 9/78
162. L.F. Horton — Displaced from 707/720 S/O to 727 S/O 2/74
163. J.O. Howatt — 707/720 Capt. Awarded I.B. 737 Capt. 7/72-5/73
Displaced from 707/720 Capt. to 727 Capt. 7/78
Displaced from 707/720 Capt. to 727 Capt. 9/79
164. L.J. Huber — Status Down Bid 727 Capt. to 737 Capt. 7/76
165. T.E. Hunter — Status Down Bid 707/720 F/O to 727 F/O 5/78
166. E.W. Huntley — Displaced from 707/720 Capt. to 727 Capt. 6/74
Displaced from 707/720 Capt. to 727 Capt. 4/79
167. C.A. Jacobson — Displaced from DC-10 S/O to DC-10 S/O 1/74
168. J.C. Jensen — Displaced from 707/720 Capt. to 727 Capt. 1/74
169. D.T. Jolley — Displaced from 727 Capt. to 737 Capt. 7/72
170. D.A. Johnson — Status Down Bid 727 S/O to 737 S/O 5/72
171. L.V. Johnson — Displaced from 707/720 S/O to 737 S/O 2/74
172. J.R. Kelly — Displaced from 727 Capt. to 737 Capt. 8/74
Status Down Bid 727 Capt. to 737 Capt. 11/75

173.	H.E. Kiley	Displaced from 707/720 S/O to 727 S/O 2/74
174.	D.F. Kisla	Displaced from 707/720 S/O to 727 S/O 1/74
175.	J.T. Klasch	DC-10 S/O Bid Awarded In Error
176.	J. Klein	Status Down Bid 707/720 Capt. to 727 Capt. 7/73
177.	K.K. Koster	Displaced from 707/720 Capt. to 727 Capt. 9/79
178.	D.J. Kowalzyk	Displaced from 707/720 S/O to 737 S/O 7/73
179.	F.H. Kratzer	707/720 Capt. Awarded I.B. 727 Capt. 7/72-5/73
		Displaced from 707/720 Capt. to 727 Capt. 9/79
180.	R.G. Krebs	Displaced from DC-10 S/O to 707/720 S/O 1/74
181.	R.V. Larsen	Status Down Bid 707/720 Capt. to 737 Capt. 6/74
182.	C.W. Law	Status Down Bid 707/720 S/O to 737 S/O 6/72
183.	D.W. Lawson	Displaced from 707/720 Capt. to 727 Capt. 12/77
184.	D.C. Leibee	Displaced from 727 Capt. to 737 Capt. 2/74
185.	A.G. Livic	Displaced from 707/720 S/O to 727 S/O 3/78
186.	A.W. Loeber	Displaced from 707/720 S/O to 727 S/O 1/74
		Displaced from 707/720 F/O to 727 F/O 7/79
187.	K.B. Luplow	Displaced from 707/720 S/O to 737 S/O 6/74
188.	D.V. Lykins	Displaced from 707/720 Capt. to 727 Capt. 1/74
		Displaced from 707/720 Capt. to 727 Capt. 3/77
		B.B.C. of 707/720 Capt. 12/78
189.	R.O. Lyle	Displaced from 707/720 F/O to 727 F/O 7/78
190.	R.G. Lyon	Status Down Bid DC-10 S/O to 707/720 S/O 12/76
191.	T. Lyons	Displaced from 707/720 F/O to 727 F/O 7/78
192.	J.A. McAdams	Displaced from 707/720 F/O to 727 F/O 7/79
193.	D. McCormick	Status Down Bid 707/720 F/O to 737 F/O 10/72
194.	R.A. McCrary	Displaced from 707/720 Capt. to 737 Capt. 4/72

195.	C.J. McCullough	Displaced from 707/720 S/O to 727 S/O 1/74
196.	M.D. McGibney	No Displacement or Down Bid.
197.	T.P. McGraw	Displaced from 707/720 S/O to 727 S/O 6/74
198.	L.P. McGree	Displaced from 707/720 Capt. to 737 Capt. 9/72
199.	R.A. McKinney	Displaced from 707/720 Capt. to 727 Capt. 2/74
200.	G.M. McKinnon	Base Bid Release From 727 Capt. 11/78
201.	R.H. McLaughlin	Displaced from 707/720 S/O to 727 S/O 6/74
202.	N.E. McLellan	Displaced from 707/720 Capt. to 727 Capt. 7/78
203.	W.R. McMahan	Displaced from 707/720 F/O to 727 F/O 11/77
		Displaced from 707/720 F/O to 727 F/O 7/79
204.	P.C. McNamee	DC-10 S/O Awarded I.B. 727 S/O 7/72-6/73
205.	C.H. McNeil	No Displacement or Down Bid.
206.	G.P. Madden	No Displacement or Down Bid.
207.	G.O. Maguire	Displaced from 707/720 Capt. to 727 Capt. 8/75
208.	T.V. Malone	Displaced from 707/720 Capt. to 727 Capt. 9/78
209.	R.H. Mantei	Displaced from 707/720 S/O to 737 S/O 2/74
		Status Down Bid 707/720 S/O to 727 S/O 5/76
210.	F.S. Marsalis	Status Down Bid DC-10 F/O to 707/720 F/O 4/73
211.	C.L. Martin	Displaced from 707/720 Capt. to 727 Capt. 7/72
		Displaced from 707/720 Capt. to 727 Capt. 1/74
212.	W.J. Mason	Displaced from 707/720 Capt. to 727 Capt. 10/79
213.	D.R. Mather	Status Down Bid 727 F/O to 737 F/O 6/78
214.	W.R. Maxey	Status Down Bid 727 F/O to 737 F/O 11/75
215.	D.L. Mayhew	Displaced from 727 S/O to 737 S/O 3/72
		Displacer from 707/720 F/O to 727 F/O 5/78
216.	R.J. Meehan	Displaced from 707/720 Capt. to 737 Capt. 9/72
		Displaced from 707/720 Capt. to 727 Capt. 10/79

217. R.G. Mensing	Displaced from 707/720 Capt. to 727 Capt. 2/74
	Displaced from 707/720 Capt. to 727 Capt. 5/76
218. J.Y. Meyers	Displaced from 707/720 F/O to 727 F/O 3/77
219. D.E. Miller	Displaced from 707/720 S/O to 737 S/O 6/74
220. G.R. Miller	Displaced from 707/720 Capt. to 727 Capt. 10/79
221. H.L. Miller	Status Down Bid 727 F/O to 737 F/O 12/78
222. B.V. Misevic	Displaced from 707/720 Capt. to 727 Capt. 2/74
223. T.G. Mullaney	Displaced from DC-10 F/O to 727 F/O 5/75
224. H.O. Myli	Displaced from 707/720 F/O to 707/720 S/O 3/72
225. E.A. Neff	Displaced from 707/720 S/O to 737 S/O 6/74
	Displaced from 707/720 S/O to 737 S/O 7/78
226. R.L. Nelson	Status Down Bid 707/720 F/O to 727 F/O 5/72
	Displaced from 707/720 F/O to 727 F/O 2/74
227. C.T. Nunley	Displaced from 707/720 F/O to 727 F/O 10/75
228. M.J. O'Brien	Displaced from 707/720 F/O to 727 F/O 7/79
229. T.M. O'Dell	Displaced from 707/720 S/O to 737 S/O 1/74
	Displaced from 727 F/O to 737 F/O 7/79
230. G.A. Oliver	Status Down Bid DC-10 Capt. to 737 Capt. 12/79
231. A.E. Oltersdorf	Status Down Bid 707/720 Capt. to 727 Capt. 6/77
232. W.B. Orgera	B.B.C. 707/720 F/O to 727 F/O 7/77
233. E.P. Oswald	Displaced from 707/720 Capt. to 727 Capt. 2/74
234. N.H. Padilla	Status Down Bid DC-10 F/O to 707/720 F/O 7/77
235. S.D. Paul	707/720 Capt. Awarded I.B. 737 Capt. 7/72-5/73
	Displaced from 707/720 Capt. to 727 Capt. 7/78
	Displaced from 707/720 Capt. to 727 Capt. 10/79

236. P.E. Paulsen	Status Down Bid 727 F/O to 737 F/O 7/79
237. M.P. Penrose	No Displacement or Down Bid.
238. J.W. Petit	B.B.C. 727 Capt. to 737 Capt. 11/75
	Displaced from 707/720 Capt. to 727 Capt. 9/79
239. L.A. Petty	Displaced from 727 Capt. to 737 Capt. 8/74
240. L.R. Pierce	Displaced from 707/720 S/O to 727 S/O 1/74
	Status Down Bid 707/720 S/O to 737 S/O 9/76
	Status Down Bid 727 F/O to 737 F/O 7/79
241. F.M. Pitcher	Displaced from 707/720 Capt. to 727 Capt. 7/79
242. D.L. Poe	Status Down Bid DC-10 Capt. to 707/720 Capt. 6/73
243. R.W. Poole	Displaced from 707/720 Capt. to 737 Capt. 1/73
	Displaced from 727 Capt. to 737 Capt. 1/74
	Displaced from 707/720 Capt. to 727 Capt. 2/76
244. W.E. Prentice	Displaced from 707/720 F/O to 707/720 S/O 1/74
245. G.H. Quantz	Displaced from 707/720 Capt. to 727 Capt. 4/74
246. O.J. Rajala	Displaced from DC-10 S/O to 707/720 S/O 9/75
247. W.C. Rand	Displaced from 707/720 S/O to 737 S/O 1/74
248. R.R. Reaume	Displaced from 707/720 S/O to 727 S/O 1/74
249. R.W. Records	B.B.C. 727 Capt. to 737 Capt. 9/76
250. B.R. Reed	Displaced from 707/720 Capt. to 727 Capt. 1/74
251. D.J. Reinhard	Displaced from 707/720 S/O to 727 S/O 1/74
252. L.D. Rick	Displaced from 707/720 F/O to 727 F/O 3/77
253. W.L. Robertson	Displaced from DC-10 S/O to 707/720 S/O 8/74
	Displaced from 707/720 F/O to 727 F/O 5/78
254. C.D. Rogge	Displaced from 707/720 S/O to 737 S/O 1/74
	Displaced from 707/720 S/O to 727 S/O 7/78
255. J.S. Ruby	Displaced from 707/720 S/O to 737 S/O 6/74
256. A.C. Rusk	Displaced from 707/720 Capt. to 737 Capt. 11/72

		Displaced from 707/720 Capt. to 737 Capt. 1/74
		Displaced from 707/720 Capt. to 727 Capt. 9/79
257.	B.J. Ruttenberg	Displaced from 707/720 Capt. to 737 Capt. 7/78
		Displaced from 707/720 Capt. to 727 Capt. 10/79
258.	T.B. Ryan	Displaced from 707/720 Capt. to 727 Capt. 6/72
259.	A.I. Salmonson	Status Down Bid DC-10 F/O to 737 F/O 8/76
260.	J.N. Saporito	Displaced from 707/720 Capt. to 727 Capt. 8/78
261.	J.P. Scanlon	Displaced from 707/720 S/O to 727 S/O 1/74
		Displaced from 707/720 F/O to 737 F/O 11/77
262.	D.D. Schlegelmilch	Status Down Bid DC-10 F/O to 737 F/O 4/72
263.	J.D. Schroll	Displaced from 707/720 S/O to 737 S/O 12/73
264.	J.L. Schwartz	Released from 727 F/O Bid 7/79
265.	R.D. Scott	Status Down Bid 707/720 Capt. to 737 Capt. 12/72
266.	D.D. Silver	Displaced from DC-10 S/O to 707/720 S/O 1/74
267.	G.L. Skeem	B.B.C. DC-10 F/O to 707/720 F/O 7/75
268.	D.F. Smith	Displaced from 707/720 S/O to 727 S/O 1/74
269.	L.D. Smith	Displaced from 707/720 F/O to 737 F/O 3/77
270.	R.G. Sponhauer	Displaced from 707/720 S/O to 737 S/O 1/74
271.	J.H. Spremkle	Displaced from 707/720 S/O to 727 S/O 1/74
272.	R.A. Stedje	Displaced from 707/720 Capt. to 727 Capt. 6/74
273.	R.L. Steely	Displaced from 727 S/O to 737 S/O 3/72
274.	D.E. Stevenson	Displaced from 707/720 Capt. to 727 Capt. 7/22
275.	H.W. Stokes	Status Down Bid 707/720 Capt. to 727 Capt. 3/77
276.	R.L. Stoltzfus	Status Down Bid 727 Capt. to 737 Capt. 5/79
277.	M.V. Stookey	Displaced from 707/720 F/O to 727 F/O 4/78
278.	R. Strachan	Displaced from 707/720 F/O to 727 F/O 3/77

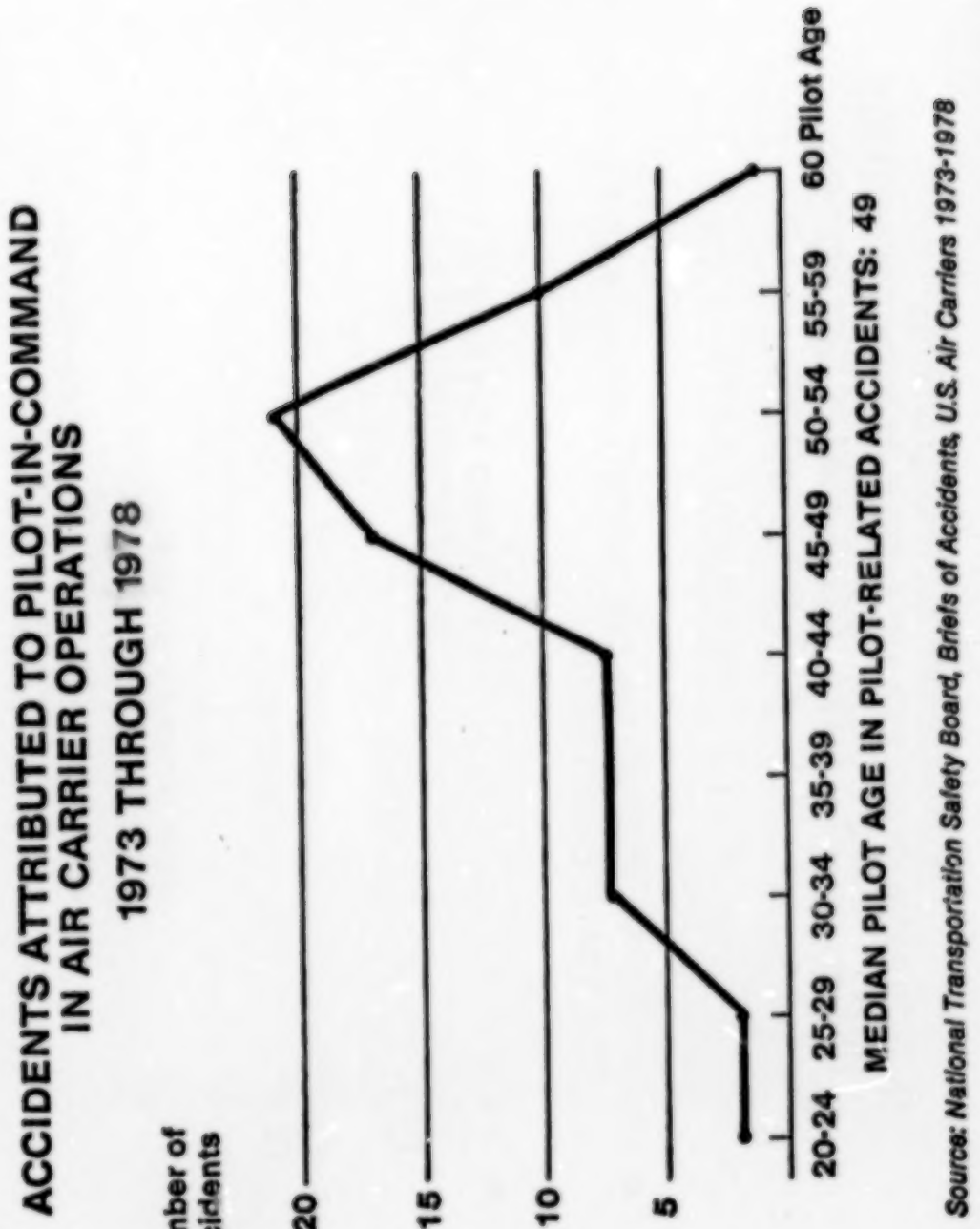
279.	M.L. Strong	Displaced from 707/720 Capt. to 737 Capt. 6/74
280.	G.W. Sublett	707/720 F/O Awarded I.B. 727 F/O 7/72-1/74
281.	M.L. Tandy	Status Down Bid 707/720 F/O to 737 F/O 12/78
282.	G.P. Taylor	707/720 F/O Awarded I.B. 727 F/O 7/72-1/73
283.	J.G. Taylor	Displaced from 707/720 Capt. to 727 Capt. 2/74
284.	E.P. Tenbroeck	Status Down Bid 727 F/O to 737 F/O 12/76
285.	J.M. Thomas	Status Down Bid 727 F/O to 737 F/O 9/76
286.	D.W. Thompson	Displaced from 707/720 S/O to 727 S/O 8/78
287.	F.M. Thompson	Displaced from 737 F/O to 727 S/O 4/72
288.	G.N. Thompson	Displaced from 727 Capt. to 737 Capt. 8/74
		B.B.C. 707/720 Capt. to 727 Capt. 4/76
289.	H.A. Thuemmler	Displaced from 707/720 Capt. to 727 Capt. 10/79
290.	A.B. Ticknor	Status Down Bid 707/720 Capt. to 727 Capt. 3/77
291.	J.W. Tilbury	Displaced from 707/720 S/O to 727 S/O 1/74
		Status Down Bid 707/720 S/O to 727 S/O 9/74
292.	T.T. Tobin	Displaced from 707/720 S/O to 727 S/O 12/77
293.	R.R. Twaddle	Displaced from 707/720 S/O to 727 S/O 2/74
294.	M.H. Uhlenhop	Displaced from 707/720 S/O to 727 S/O 1/74
		Displaced from 707/720 F/O to 727 F/O 12/77
295.	R.O. Urdahl	Displaced from 707/720 Capt. to 727 Capt. 2/78
		Displaced from 707/720 Capt. to 727 Capt. 11/78
296.	J.M. Valenzuela	Displaced from 707/720 S/O to 727 S/O 7/78
297.	N.P. Valleau	737 S/O Entered In Error
298.	R.E. Van Dyke	Displaced from 707/720 Capt. to 727 Capt. 3/77
299.	D.A. Vecchi	Status Down Bid 727 S/O to 737 S/O 11/78
300.	G.D. Walker	Displaced from 707/720 S/O to 727 S/O 2/74
301.	D.J. Walsh	Displaced from 727 S/O to 737 S/O 3/72
302.	T.D. Ward	Displaced from 707/720 Capt. to 727 Capt. 1/74

303.	T.D. Watson	Displaced from 707/720 F/O to 727 F/O 7/78
304.	J.H. Weatherly	Status Down Bid DC-10 S/O to 727 S/O 9/72 Status Down Bid 707/720 F/O to 727 F/O 3/77
305.	R.T. Weaver	Displaced from 707/720 F/O to 737 F/O 10/77 Displaced from 707/720 F/O to 727 F/O 7/79
306.	W.R. Weigel	Displaced from 707/720 S/O to 727 S/O 2/74
307.	L.R. Wendelbo	Displaced from 707/720 Capt. to 737 Capt. 8/77
308.	J.E. West	Status Down Bid 727 Capt. to 737 Capt. 8/79
309.	T.E. West	Displaced from 707/720 S/O to 737 S/O 10/77
310.	J.M. White	Displaced from DC-10 S/O to 707/720 S/O 1/74
311.	L.L. Wilkinson	Status Down Bid 707/720 Capt. to 727 Capt. 6/74
312.	E.J. Willard	Status Down Bid 707/720 Capt. to 737 Capt. 2/77
313.	J.E. Williams	Status Down Bid 707/720 Capt. to 737 Capt. 6/72
314.	L.F. Wittenburg	Displaced from 707/720 Capt. to 727 Capt. 10/77
315.	R.S. Wood	Displaced from 707/720 S/O to 737 S/O 6/74
316.	M.E. Younker	707/720 Capt. Awarded I.B. 7/72-9/72
317.	F.L. Zappone	B.B.C. 707/720 F/O to 727 F/O 5/75 Displaced from 707/720 F/O to 727 F/O 6/78
318.	W.W. Zink	Status Down Bid 727 Capt. to 737 Capt. 4/77

I.B. = Interim Bid awarded on temporary basis until Permanent Bid is activated. This was a mutual understanding with ALPA and WAL and was only used in July 1972.

B.B.C. = Base Bid Cancellation indicates that a pilot had his future bid rescinded prior to activation.

PLAINTIFFS' EXHIBIT 155



ACCIDENTS/INCIDENTS INVOLVING PILOT IN COMMAND, CO-PILOT INCAPACITATION AS A CAUSE/FACTOR, U.S. AIR CARRIERS

1962 THROUGH 1977

- TOTAL OF 12 REPORTED INSTANCES IN 16-YEAR PERIOD (.75 INCIDENTS PER YEAR)
- 2 REPORTED ACCIDENTS (1 CARGO 12/14/62), 1 MILITARY TRANSPORT (4/20/66), NONE IN SCHEDULED DOMESTIC PASSENGER SERVICE
- PILOTS AFFECTED WERE AGE 36, 38, 40, 49, 50, 54, 59* (5 PILOTS AGE UNKNOWN)

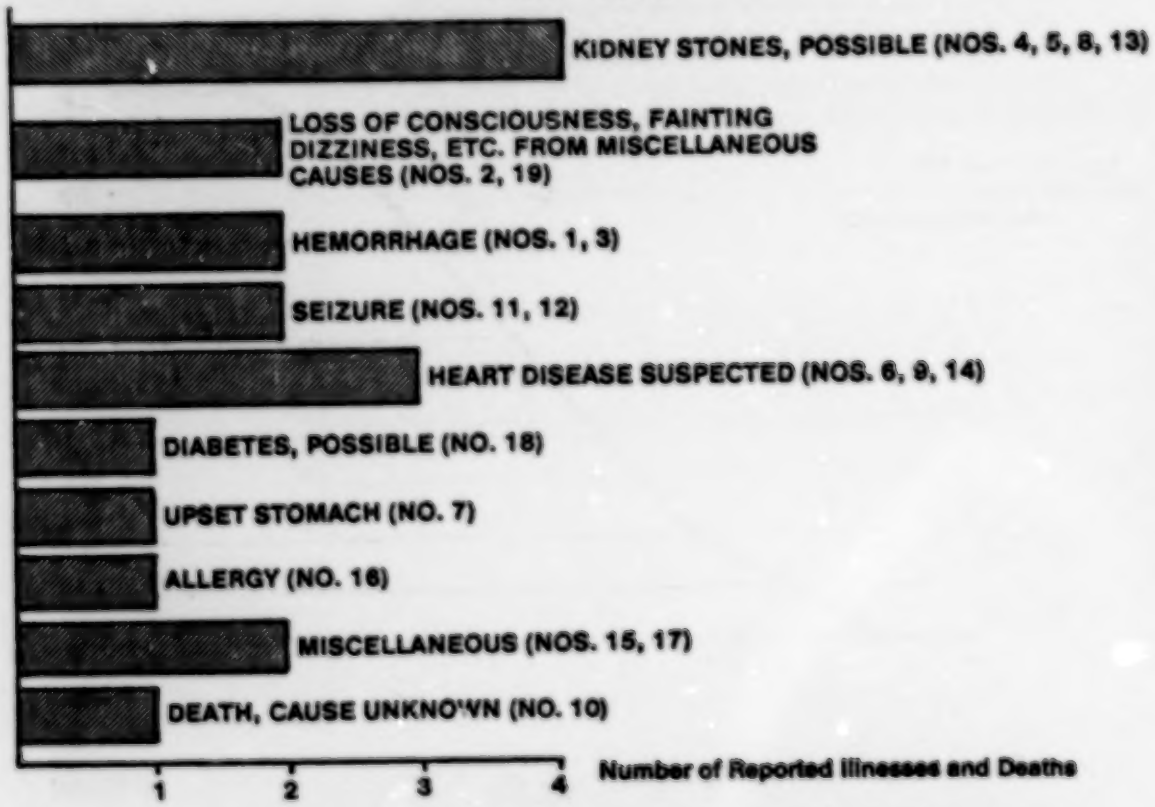
Source: National Transportation Safety Board

**Pilot (Age 59) "had been under treatment for angina pectoris for 19 years (and knew of the diagnosis), also for diabetes–took drugs regularly for both."*

PLAINTIFFS' EXHIBIT 159

116

REPORTED* AIR CARRIER INFLIGHT ILLNESSES AND DEATHS OF FLIGHT DECK CREWMEMBERS 1971 - 1975



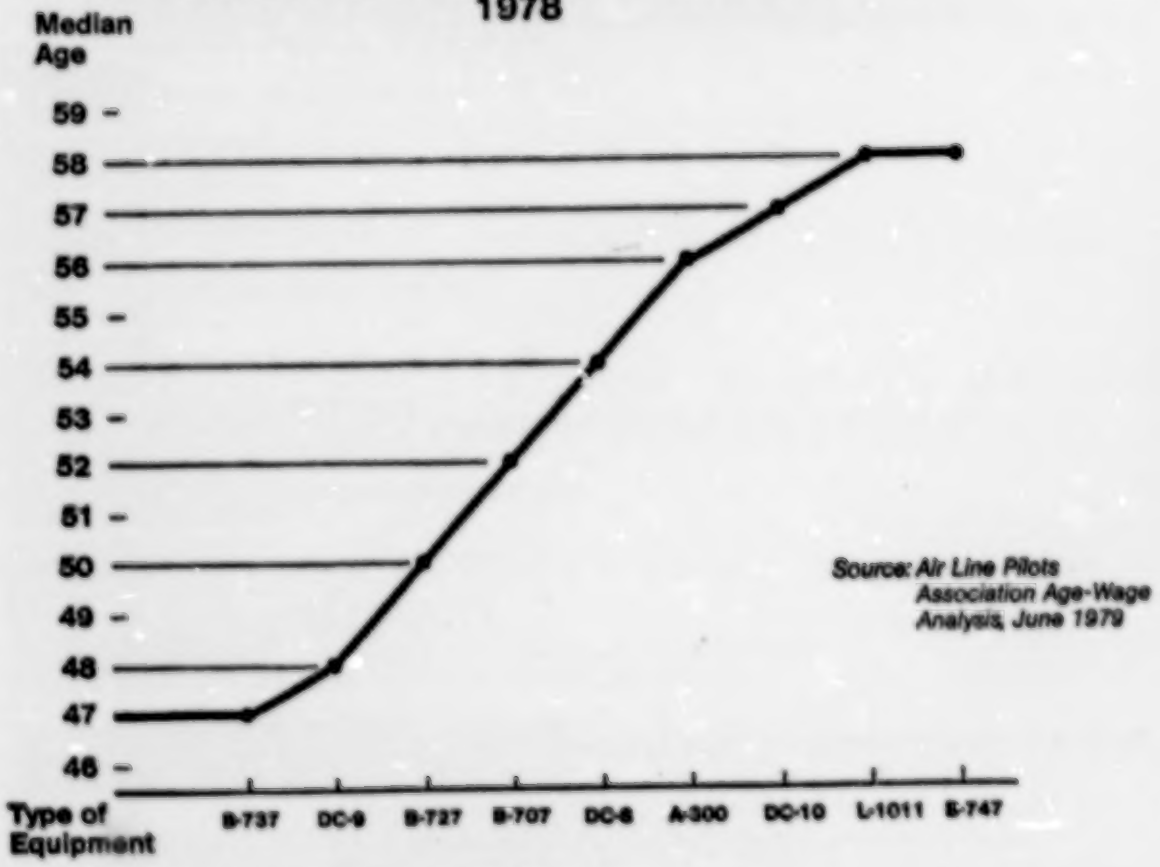
*ILLNESSES NECESSITATING UNSCHEDULED LANDINGS ARE REQUIRED TO BE REPORTED

SOURCE: FAA CIVIL AEROMEDICAL INSTITUTE REPORT NO. AAC-119-78-10 (a)

PLAINTIFFS' EXHIBIT 160a

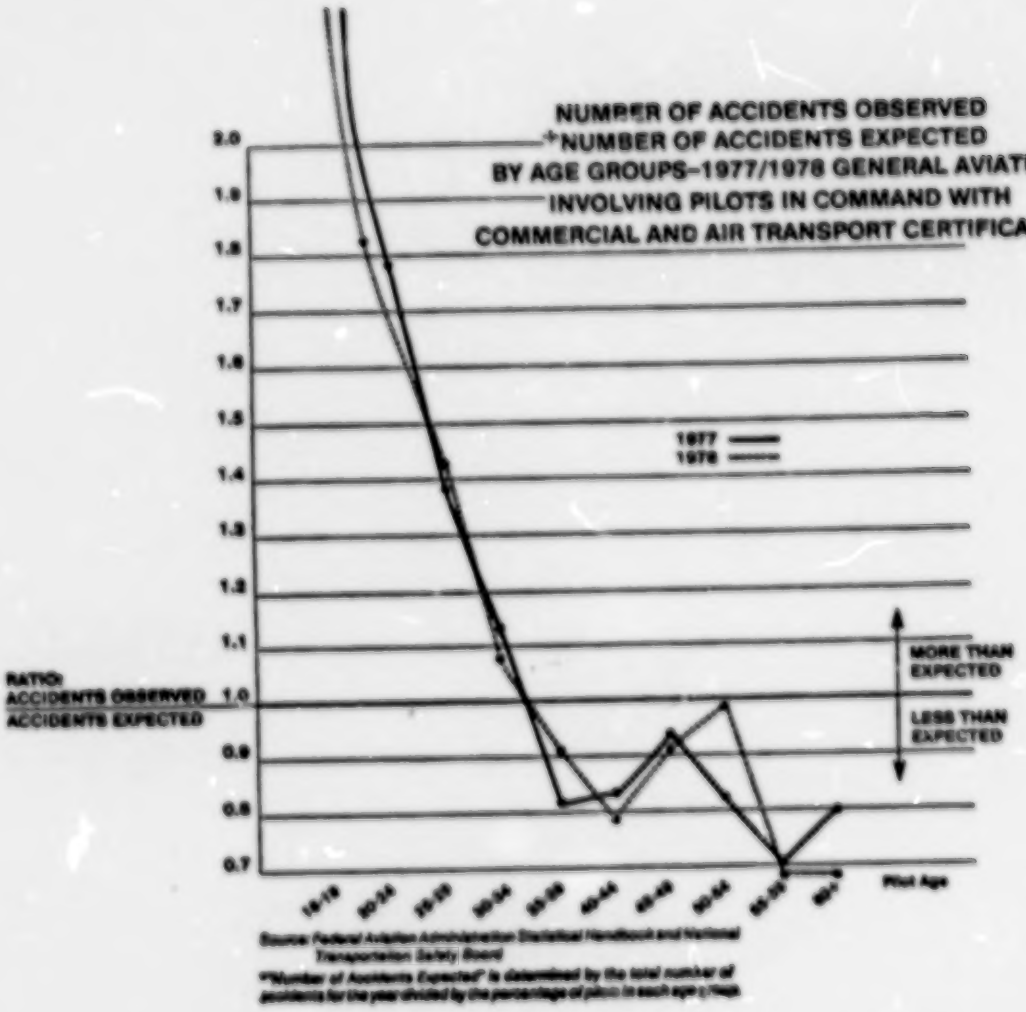
117

MEDIAN AGE OF ALPA CAPTAINS ON U.S. TRUNK CARRIERS BY TYPE OF EQUIPMENT 1978



Median age of Alpa Captains (all equipment):52

NUMBER OF ACCIDENTS OBSERVED
÷NUMBER OF ACCIDENTS EXPECTED
BY AGE GROUPS–1977/1978 GENERAL AVIATION
INVOLVING PILOTS IN COMMAND WITH
COMMERCIAL AND AIR TRANSPORT CERTIFICATES*



Source: Federal Aviation Administration Statistical Handbook and National Transportation Safety Board

*"Number of Accidents Expected" is determined by the total number of accidents for the year divided by the percentage of pilots in each age group

RESPONDENT'S

BRIEF

No. 83-1545

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WESTERN AIR LINES, INC.,
Petitioner,

v.

CHARLES G. CRISWELL, ALBERT RON
and RULON H. STARLEY,
Respondents.

WESTERN AIR LINES, INC.,
Petitioner,

v.

WESCOT B. STONE, III, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the jury was properly instructed on the BFOQ issue under the *Tamiami* standard which required Western to prove that it is highly impractical to deal with age sixty flight engineers on an individualized basis to determine their safe and efficient job performance, and whether the courts below properly rejected a "rational basis" BFOQ test as inconsistent with the ADEA's requirement that a BFOQ be "reasonably necessary to the normal operation of the particular business."

2. Whether, in an ADEA case where the employer defended its actions with both affirmative defenses and denials, the district court properly instructed the jury that plaintiffs bore the burden throughout the case of proving that age was a determining factor, and whether the court properly instructed the jury regarding Western's specialized "reasonable factors other than age" defense based on the System Board of Adjustment decision.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF THE CASE	2
A. The Proceedings Below	2
B. The BFOQ Issue	11
C. The Downbidding Issue	19
SUMMARY OF ARGUMENT	23
ARGUMENT	26
I. THE JURY WAS CORRECTLY INSTRUCTED UNDER THE *TAMIAMI* BFOQ STANDARD	26
A. Western Has Distorted The *Tamiami* BFOQ Test	28
B. The *Tamiami* BFOQ Test Was Correctly Embodied In The Jury Instructions	29
C. Western's Proposed "Rational Basis" BFOQ Standard is Contrary to the Statutory Requirement That a BFOQ Be "Reasonably Necessary to the Normal Operation of the Particular Business"	31
D. Western's Obligations As a Certificated Air Carrier Were Fully Accommodated in the Instructions and in the Evidence	34
II. THE "REASONABLE FACTORS OTHER THAN AGE" PROVISION IN THE ADEA IS AN AFFIRMATIVE DEFENSE	37

TABLE OF CONTENTS—Continued

	Page
A. The "Reasonable Factors" Exception in the ADEA Is A Defense to the Prohibition Against Age Discrimination; the Employer Bears the Burden of Proof	37
B. Given Its Specialized "Reasonable Factors" Defense in This Case, It is Particularly Appropriate To Assign the Burden of Proof to Western	41
C. The Trial Court Appropriately Assigned The Burdens of Proof on the Downbidding Issue	43
D. Western Had the Burden of Proving Its Contract/System Board Defense As A Business Necessity in Response to Plaintiffs' Disparate Impact Showing	45
CONCLUSION	46

TABLE OF AUTHORITIES

CASES	Page
A.H. Phillips v. Walling, 324 U.S. 490 (1945)	39
Air Line Pilots Association, International v. Trans World Airlines, Inc., 713 F.2d 940 (2d Cir. 1983), *cert. granted sub nom. Trans World Airlines, Inc. v. Thurston*, 104 S. Ct. 1412 (1984) (No. 83-997)	27
Akins v. South Central Bell Telephone Co., 744 F.2d 1133 (5th Cir. 1984)	45
Allison v. Western Union Telegraph Co., 680 F.2d 1318 (11th Cir. 1982)	45
Arnold v. Ben Kanowsky, Inc., 361 U.S. 388 (1960)	39
Beard v. Mitchell, 604 F.2d 485 (7th Cir. 1979)	35
Bence v. Detroit Health Corp., 712 F.2d 1024 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 1282 (1984)	39
Corning Glass Works v. Brennan, 417 U.S. 188 (1974)	39
Criswell v. Western Air Lines, Inc., 21 Empl. Prac. Dec. [CCH] ¶ 30, 466 (C.D. Cal. 1979)	2
Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971)	27
Dothard v. Rawlinson, 433 U.S. 312 (1977)	8, 27
Douglas v. Anderson, 656 F.2d 528 (9th Cir. 1981)	45
EEOC v. Borden's, Inc., 724 F.2d 1390 (9th Cir. 1984)	45
EEOC v. Central Kansas Medical Center, 705 F.2d 1270 (10th Cir. 1983)	39
EEOC v. County of Los Angeles, 706 F.2d 1039 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 984 (1984)	16
EEOC v. County of Santa Barbara, 666 F.2d 373 (9th Cir. 1982)	33
EEOC v. Missouri Highway Patrol, 555 F. Supp. 97 (W.D. Mo. 1982), *rev'd*, 53 U.S.L.W. 2272 (8th Cir. 1984)	16
EEOC v. University of Texas, 710 F.2d 1091 (5th Cir. 1983)	28-29

TABLE OF AUTHORITIES—Continued

	Page
Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981)	45
Griggs v. Duke Power Co., 401 U.S. 424 (1971)	45
Guthrie v. Lady Jane Collieries, Inc., 722 F.2d 1141 (3d Cir. 1983)	39
Harriss v. Pan American World Airways, Inc., 649 F.2d 670 (9th Cir. 1980)	8
Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975)	4, 33
Hoefelman v. Missouri Department of Conservation, 718 F.2d 281 (8th Cir. 1983)	29
Johnson v. American Airlines, Inc., No. 83-1610 (5th Cir. Nov. 8, 1984)	29
Kelly v. American Standard, Inc., 640 F.2d 974 (9th Cir. 1981)	34
Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983)	45
Levin v. Delta Air Lines, Inc., 730 F.2d 994 (5th Cir. 1984)	29, 36
Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979)	41
Lorillard v. Pons, 434 U.S. 575 (1978)	26
Marshall v. Westinghouse Electric Corp., 576 F.2d 588 (5th Cir. 1978)	40-42
Massarsky v. General Motors Corp., 706 F.2d 111 (3d Cir.), *cert. denied*, 104 S. Ct. 348 (1983)	45
Mitchell v. Kentucky Finance Co., 359 U.S. 290 (1959)	39
Monroe v. United Air Lines, Inc., 736 F.2d 394 (7th Cir. 1984), *pet. for cert. filed*, 53 U.S.L.W. 3406 (U.S. Nov. 8, 1984) (No. 84-774)	36
Orzel v. City of Wauwatosa, 697 F.2d 743 (7th Cir.), *cert. denied*, 104 S. Ct. 484 (1983)	27, 28, 33
Plemer v. Parsons-Gilbane, 713 F.2d 1127 (5th Cir. 1983)	39
Smallwood v. United Air Lines, Inc., 661 F.2d 303 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982)	27

TABLE OF AUTHORITIES—Continued

	Page
Starr v. FAA, 589 F.2d 307 (7th Cir. 1978)	33
Stone v. Western Air Lines, Inc., 544 F. Supp. 33 (C.D. Cal. 1982)	10
Thompson v. Sawyer, 678 F.2d 257 (D.C. Cir. 1982)	39
Tuohy v. Ford Motor Co., 490 F. Supp. 258 (E.D. Mich. 1980), *rev'd*, 675 F.2d 842 (6th Cir. 1982)	4, 29, 31-32
Udall v. Tallman, 380 U.S. 1 (1965)	40
United States v. Rothman, 567 F.2d 744 (7th Cir. 1977)	35
Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976)	5, 26-36
Walling v. General Industries Co., 330 U.S. 545 (1947)	39
Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228 (5th Cir. 1969)	27, 28

STATUTES

Fair Labor Standards Act,	
29 U.S.C. § 206(d)	38
Age Discrimination in Employment Act,	
29 U.S.C. § 621 *et seq.*	2
29 U.S.C. § 623(a)	2, 26, 38
29 U.S.C. § 623(f)(1)	3, 20, 26, 37, 38
29 U.S.C. § 623(f)(2)	3, 10, 38, 42
29 U.S.C. § 626(c)(2)	35
Federal Aviation Act of 1958,	
49 U.S.C. § 1421(b)	34

REGULATIONS

Federal Aviation Regulations,	
14 C.F.R. § 121.383(c)	2
14 C.F.R. § 121.385(d)	18
Department of Labor Interpretations,	
29 C.F.R. § 800.141(a) (1984)	40
29 C.F.R. § 860.102(e) (1969)	27
29 C.F.R. § 860.103(e) (1983)	40

TABLE OF AUTHORITIES—Continued

	Page
EEOC Interpretations, 29 C.F.R. § 1625.7(e) (1983)	40
FEDERAL REGISTER	
49 *Fed. Reg.* 14692 (April 12, 1984)	14
LEGISLATIVE HISTORY	
H. Conf. Rep. No. 950, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 528	35
S. Rep. No. 493, 95th Cong., 1st Sess. (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 504	35

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1545

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CHARLES G. CRISWELL, ALBERT RON and RULON H. STARLEY,
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Petitioner,
v.
WESCOT B. STONE, III, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS

OPINIONS BELOW

In addition to the opinions referred to in the brief of petitioner Western Air Lines, Inc. (Western) (Br. 1-2), the district court in *Criswell* issued two other opinions which are relevant to the issues presented for review. In July 1978, the court issued a preliminary injunction continuing respondent Ron in his employment beyond age sixty (J.A. 46, 49).[1] In September 1979, the court denied

[1] "J.A. ——" refers to the Joint Appendix filed by the parties in this Court. "A——" refers to the Appendix to Western's petition

Western's summary judgment motion against respondents Criswell and Starley on the downbidding issue (A74), and withdrew its earlier summary judgment decision (A67) against them. The September 1979 order is unofficially reported at 21 Empl. Prac. Dec. [CCH] ¶ 30,466. The district court in *Stone* also issued a relevant order which is not referred to in petitioner's brief. In April 1984, the court issued an order (J.A. 67) on a motion to clarify the preliminary injunction reinstating the *Stone* Captain plaintiffs which had been entered, without opposition by Western with regard to reinstatement, in March 1984 (A112).

STATEMENT OF THE CASE

A. The Proceedings Below.

These cases challenge Western's practice of mandatorily retiring all flight deck crewmembers at age sixty and its refusal to permit Captains approaching age sixty to transfer to flight engineer positions. The Criswell respondents brought their action under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (ADEA) in June 1978, alleging violations of ADEA Section 4(a), 29 U.S.C. § 623(a) (R. 1). Criswell and Starley were DC-10 Captains; Ron was a DC-10 flight engineer, called Second Officer on Western. Each sought to continue his employment beyond age sixty as a Second Officer, which is a position not covered by the FAA's "Age 60 Rule," 14 C.F.R. § 121.383(c), barring service as an airline Captain after age sixty (J.A. 46).

Prior to their sixtieth birthdays in June 1978 (Ron) and July 1978 (Criswell and Starley), respondents filed

---

for certiorari which contains most of the relevant decisions below. "Tr. ——" refers to the *Criswell* trial transcript, except where otherwise noted. "PX ——" refers to a plaintiffs' exhibit admitted in evidence in *Criswell*. "R. ——" refers to the numbered entries on the district court clerk's docket in *Criswell*. The district court docket entries are reproduced in the Joint Appendix (J.A. 1).

suit and sought a preliminary injunction. Western presented no affidavits in opposition to the motion based on safety, and made only passing reference to safety in its memorandum (R. 8). Ron's preliminary injunction application was granted, and Criswell's and Starley's were denied (J.A. 49). Ron thus continued his employment as a DC-10 flight engineer throughout the litigation (A31).

Western's amended answer asserted various defenses under the ADEA, including the "bona fide occupational qualification" (BFOQ) and "reasonable factors other than age" defenses under 29 U.S.C. § 623(f)(1). Western also asserted that the retirements of plaintiffs were in accordance with the bona fide pension plan or bona fide seniority system provision of ADEA Section 4(f)(2), 29 U.S.C. § 623(f)(2), and that the 1978 ADEA amendments prohibiting mandatory retirement under such plans or systems were not yet effective on Western (R. 23, p. 4). Because of the immediate effectiveness of the 1978 amendments, however, the Section 4(f)(2) retirement defense was disposed of in pretrial orders (J.A. 47-48; A80), and the jury was so instructed (J.A. 64). Contrary to the statement in Western's brief (Br. 8), Western did not assert the bona fide seniority system defense under ADEA Section 4(f)(2) with respect to the Criswell-Starley downbids. That defense was raised by Western on appeal for the first time.

In September 1979, the district court ruled on cross-motions for summary judgment (A74). The court denied Western's motion against Criswell and Starley on the transfer or "downbidding" issue. After the lawsuit was initiated, a System Board of Adjustment in November 1978 had decided that the Criswell-Starley downbids were not authorized under a particular provision of the pilot collective bargaining agreement.[2] The district court

---

[2] Western seriously misrepresents the sequence of events by stating that no review was sought of the System Board decision but that, "[i]nstead, Captains Criswell and Starley requested that

found that this constituted "a" substantial and reasonable factor other than age for the denial of the downbids, but that there was a material factual dispute as to whether age was a substantial and determinative factor in the denial of the downbids (A81).

The case was tried to a jury in October and November 1980. A verdict was rendered in favor of all three Criswell respondents, with the jury finding that Western had willfully violated the ADEA (R. 197).

At the beginning of trial, Western moved for dismissal and nonsuit on the opening statement (R. 166). Its position was that the FAA's Age 60 Rule for pilots makes age sixty a "*per se* reasonable" BFOQ for flight engineers as a matter of law. The authority cited for the motion was the district court opinion in *Tuohy v. Ford Motor Co.*, 490 F. Supp. 258 (E.D. Mich. 1980), *rev'd*, 675 F.2d 842 (6th Cir. 1982). The motion was denied (Oct. 21, 1980 Tr. 49).

At the close of plaintiffs' evidence, Western moved for a directed verdict based on the district court opinion in *Tuohy* and on the argument that plaintiffs' evidence did not negate the contention that it was *per se* reasonable to apply the FAA's Age 60 Rule to flight engineers (R. 182). In denying the motion, the district court reserved judgment on the applicability of the *Tuohy* district court test, but commented that the test, if applied, "would take the question away from the jury" (Tr. 1235).

Western tendered a series of BFOQ instructions based on the *Tuohy* district court decision and certain phraseology in *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975) (R. 164). The theme of these instructions was that Western could meet its BFOQ burden of proof with a "rational

---

they be allowed to transfer . . . ." (Br. 8). The System Board decision postdated the institution of the lawsuit by five months and the downbids by over a year.

basis in fact for defendant to believe that use of Second Officers (flight engineers) over age 60 on its DC-10 airliners would increase the likelihood of risk to its passengers." The instructions would have told the jury:

- You may consider the underlying rationale of the FAA's Age 60 Rule to constitute a rational basis in fact for a BFOQ "and may if you wish, find for defendant Western on this issue without considering any other evidence" (D. Instr. 19.1).
- With regard to expert testimony, "it is not necessary for you to agree or disagree with any part of it." "Rather, you are to decide whether an airline such as Defendant with its duty to maintain the highest possible safety for its passengers had on the basis of the totality of that evidence (including the FAA Age 60 Rule) a rational basis in fact for believing that use of Second Officers (flight engineers) over Age 60 would increase the risk of harm or death to any one of its passengers" (D. Instr. 19.2).

Criswell respondents tendered a BFOQ instruction based on the test enunciated in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976), which read in operative part (R. 157):

> To meet its burden under the BFOQ provision, Western must show (1) that it is reasonably necessary to the essence of its business to have an age limitation of sixty for Second Officers, and (2) that it has reasonable cause, that is, a basis in fact for believing that all or substantially all persons sixty years of age or above are unable to perform the duties of Second Officer safely and efficiently, or that it is impossible or impractical to evaluate Second Officers age sixty and over on an individualized basis.

Western objected to the inclusion of the statutory phrase "reasonably necessary to the normal operation of the particular business" in any form on the ground that

it was irrelevant under the *per se* rational basis standard of the *Tuohy* district court test (R. 164). Also, relying on *Tuohy* district court and *Greyhound*, Western objected that both the "all or substantially all" and the "impossible or impractical" aspects of the *Tamiami* BFOQ test were improper to submit to a jury in a case involving issues of airline safety.

In the course of the trial Western submitted an alternative BFOQ instruction which was to be given only if the court rejected the *Tuohy-Greyhound* instructions (R. 184). The alternative instruction was Western's attempt to formulate a *Tamiami* instruction. It placed the burden on defendant to prove the BFOQ defense by a preponderance of the evidence and paraphrased, for the most part, language from the "impossible or impractical" individualized assessment aspect of the *Tamiami* formulation.

Western's alternative BFOQ instruction was given by the district court in an abbreviated, modified form as follows (J.A. 61-62):

> If you find that plaintiffs have persuaded you by a preponderance of the evidence that their involuntary retirements were the result of policies in which age discrimination was a determining factor, then you must consider defendant's defense that age is a "bona fide occupational qualification" for its Second Officers (flight engineers). This defense is usually abbreviated "BFOQ". The BFOQ defense is available only if it is reasonably necessary to the normal operation —essence—of defendant's business. In this regard, I instruct you that the normal operation—essence—of Western's business is the safe transportation of air passengers.
>
> The burden of proof to show a BFOQ is on the defendant. If defendant establishes such a BFOQ by a preponderance of the evidence, then its age discrimination is lawful under the ADEA.

> One method by which defendant Western may establish a BFOQ in this case is to prove
>
> (1) that in 1978, when these plaintiffs were retired, it was highly impractical for Western to deal with each Second Officer over age 60 on an individualized basis to determine his particular ability to perform his job safely, and
>
> (2) that some Second Officers (flight engineers) over age 60 possess traits of a physiological, psychological, or other nature which preclude safe and efficient job performance that cannot be ascertained by means other than knowing their age.
>
> In evaluating the practicability to defendant Western of dealing with Second Officers over age 60 on an individualized basis, with respect to the medical testimony you should consider the state of the medical art as it existed in July 1978.

The BFOQ instruction given by the court modified Western's alternative BFOQ instruction by substituting, in the subparagraphs dealing with the individualized assessment aspect of the *Tamiami* test, words from the *Tamiami* opinion itself: the reference to traits "preclud[ing] safe and efficient performance that cannot be ascertained by means other than knowing their age" (taken from *Tamiami*, 531 F.2d at 235) was inserted, as was the phrase "highly impractical" (*id.*). The court abbreviated but retained Western's concept that the state of the medical art in 1978 was controlling, deleted two paragraphs that would have allowed the jury to find a BFOQ for flight engineers based solely on the existence of the FAA's Age 60 Rule, and added a direction to the jury that safety is the essence of Western's operations:

> The BFOQ defense is available only if it is reasonably necessary to the normal operation—essence—of defendant's business. In this regard, I instruct you that the normal operation—essence—of Western's business is the safe transportation of air passengers.

The court included the "essence" portion of the BFOQ instruction on its own to reflect an additional element from the *Tamiami* opinion (Tr. 2240-41, 2369-73).

After the jury returned its verdict the district court took additional evidence and considered issues of equitable relief. In May 1981, the court issued a memorandum opinion and entered a final judgment and permanent injunction. 514 F. Supp. 384 (A31, 54). The court made independent findings that Western had violated the ADEA and had not prevailed on its BFOQ, business necessity, or reasonable factors other than age defenses. The court also ordered the reinstatement of Criswell and Starley and the continued employment of Ron. In addition, Western was enjoined generally from refusing to allow flight deck crewmembers to work as Second Officers after age sixty. Western then filed motions for a new trial, judgment notwithstanding the verdict and associated relief, which were denied (R. 282).

The Ninth Circuit affirmed in all respects in June 1983. 709 F.2d 544 (A1). Just after the *Criswell* trial the Ninth Circuit in *Harriss* v. *Pan American World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980), had adopted the *Tamiami* BFOQ test. Accordingly, the BFOQ instruction was upheld. The court of appeals rejected Western's proposed rational basis BFOQ test by reference to the similar test which had been rejected in *Harris*, 649 F.2d at 677 (A11):

> The flaw in the district court's standard as it applies to the BFOQ defense is that it requires only that the policy be "reasonable" in light of the safety factor rather than "reasonably necessary . . . ."
>
> Adoption of such a standard here would unnecessarily broaden the BFOQ defense which the Supreme Court characterized in *Dothard* v. *Rawlinson*, 433 U.S. 321, 334 (1977), as "an extremely narrow

> exception to the general prohibition of discrimination on the basis of sex."

The court of appeals affirmed the denial of Western's motion for judgment notwithstanding the verdict on the BFOQ issue as follows (A14):

> Substantial evidence supports this jury verdict. The plaintiffs presented two well-qualified experts who testified that Western's age sixty policy was not necessary to assure that the tasks involved in the position of second officer would be performed safely. They testified further that present-day diagnostic techniques and the current level of medical knowledge make possible individual determinations of whether a second officer over sixty possesses the health and can maintain the safety standards necessary aboard a large commercial aircraft. Testimony about the effectiveness of Western's evaluations, check-ups and simulator training for individual second officers was before the jury, as well as testimony that there is always another flight crew member aboard who has been trained to perform the second officer's duties in the event of incapacitation. There was evidence that although there have been accidents arising out of pilot incapacitations, there has never been one caused by the disability of a second officer. The jury heard testimony that Western itself allows a captain under the age of sixty who cannot, for health reasons, continue to fly as a captain or co-pilot to downbid to a position as second officer. When the evidence showed all this, as well as the fact that half the pilots flying in the United States are flying for major airlines which do not require second officers to retire at the age of sixty, and that there are over 200 such second officers currently flying on wide-bodied aircraft, the trial court could not, as a matter of law, have determined that this jury was incorrect when it also decided that retirement at the age of sixty was not a BFOQ for second officers. The district court correctly denied the motion for judgment n.o.v.

On the downbidding issue, the court of appeals rejected Western's argument that the jury was improperly instructed with respect to Western's reasonable factors other than age defense (A16-17). Noting the inclusion of the reasonable factors other than age provision in the ADEA alongside the BFOQ statutory exception, the court held that the defense was an affirmative defense for which the employer bore the burden of proof, and should not be analogized to the second stage of the case-in-chief in a disparate treatment case.

After the entry of judgment in *Criswell* in 1981, Western sought and obtained a stay of the systemwide injunction (R. 283). Therefore, the *Stone* action was filed as a followup to *Criswell*, and a preliminary injunction was sought. The injunction was granted in December 1981 as to Albert White, who, like Criswell respondent Ron, is a career flight engineer (A100). The *Stone* preliminary injunction was consolidated with *Criswell* on appeal.

In July 1982 the district court in *Stone* reconsidered portions of the December 1981 order dealing with the claims of the downbidding *Stone* Captain plaintiffs, and ruled that the bona fide seniority system defense under 29 U.S.C. § 623(f)(2) was unavailable to Western as a matter of law. 544 F. Supp. 33 (A101). Reinstatement of the Captain plaintiffs was not ordered at that time, however.

The eleven *Stone* Captain plaintiffs renewed their motion for preliminary injunction in February 1984. Western, although not joining in plaintiffs' motion, did not oppose their reinstatement *pendente lite*, and the injunction was entered in March 1984 (A112). As had been done when Criswell respondents (A57) and Albert White (*see* A114) were reinstated, the court allowed Western to administer to reinstated plaintiffs "such medical examinations in addition to the FAA second-class airman's

examination, which Western deems appropriate to enable it to discharge its responsibility as a certificated air carrier" (A116).

In the intervening two and one-half years since Criswell respondents' reinstatement Western had not opted to administer any medical examinations to age sixty flight engineers (A114). Following the 1984 stipulated injunction in *Stone*, however, Western sought to impose upon age sixty flight engineers, but upon no other crewmembers, a series of medical tests which were challenged as painful, dangerous, and experimental. After receiving evidence that Western's medical experts (including its expert from the *Criswell* trial) did not consider the proposed tests necessary for Western to discharge its air carrier safety obligations, and did not recommend that such tests be required as a routine matter for flight engineers of any age, the court limited the medical testing to those proposed by Western's medical expert when he testified at trial in *Criswell* (J.A. 67).

B. The BFOQ Issue.

Notwithstanding the posture of this case in this Court as a challenge to the appropriateness of the BFOQ jury instruction, Western's factual recitation in its statement of the case and argument breaks through the outer envelope of fair adversarial narrative for a party not challenging the sufficiency of the evidence. Two of the most egregious assertions Western makes in the face of compelling evidence to the contrary, and the short response to each, are:

> *ASSERTION*: Western made a safety judgment in retiring the Criswell respondents at age sixty.
>
> *RESPONSE*: Western made no safety judgment at all in retiring the Criswell respondents. The sole reason given for the retirements was the retirement age in the pilot pension plan, according to Western's flight operations official who made the decision in

1978 (PX 8, 14 [J.A. 89, 91]; Tr. 58-61, 2056-57). The matter of age and safety was not a consideration (Tr. 61, 2056). Over two years later, in 1980, he was asked (Tr. 2058):

> Q. What are the facts, to your knowledge, upon which Western is relying in support of its position that you have to be under 60 in order to be a second officer?
>
> A. I don't know the facts.

Before terminating the Criswell respondents, Western consulted neither its medical expert trial witness (Tr. 1511, 1514-15) nor its own medical director (Tr. 597, 1515-16).

ASSERTION: Western did not have the means to determine which individuals over age sixty would be able to perform Second Officer duties safely and efficiently.

RESPONSE: Although the bulk of the trial was taken up with this issue and the court of appeals upheld the denial of Western's JNOV motion (A14), for purposes of responding to Western's assertion here it is sufficient to point to key admissions from Western's own witnesses on both the medical and operational aspects of the BFOQ issue:

1. Western's expert, Dr. Busby, who had never advocated an age sixty limit for Second Officers during his years as FAA Deputy Federal Air Surgeon (Tr. 1521; *see* Tr. 1265), testified that he would be "comfortable" with flight engineers beyond age sixty after a comprehensive one-day medical examination (Tr. 1675-78).

2. Western's witnesses were unanimous in testifying that Western's computerized flight simulators are objectively reliable in assessing the safe and efficient job performance characteristics of all crewmembers, regardless of age (Tr. 42-45, 450, 452, 531-32, 2213-14).

1. *The Flight Engineer Job.* In view of Western's continuing attempt to equate the flight engineer job with the pilot job, it is important to review the differences between the two (A37-38):

> [A] distinction must be made between the duties of a flight engineer, on the one hand, and the duties of a pilot (including copilot), on the other. On a wide-bodied aircraft the flight engineer sits at his own instrument panel. His function during normal flight is to monitor and adjust a number of the systems which are necessary to the operation of the aircraft, such as the hydraulic and electrical systems. He does not manipulate the flight controls. Thus, his normal duties are less critical to the safety of flight than those of a pilot. He does have important contingency duties in emergency situations, such an an all-engine flameout.

Western's Second Officers are not qualified or trained as pilots on Western's aircraft, and do not perform pilot functions (Tr. 10-11). Contrary to Western's absurd argument that it attempts to "equalize" pilot and flight engineer duties (Br. 33), Western acknowledged that the Second Officer gives no commands and has no responsibility for the conduct of the flight (Tr. 2044; *see* Tr. 454).

2. *The FAA's Age 60 Rule.* Western relies heavily on FAA's Age 60 Rule for Captains and copilots, which does not apply to flight engineers (Second Officers) (J.A. 46, 62; A79). Although the FAA has from time to time received requests to extend the Age 60 Rule to the flight engineer position, it has never found it necessary to do so, in view of the absence of evidence that the age of a flight engineer has any effect on safe performance of duties (Tr. 588-89).

At the time of trial, there were more than 200 flight engineers over age sixty employed by American, TWA,

and Pan American Airlines (A14, 39), all performing duties similar to Western's flight engineers. Since that time, the number of age sixty flight engineers has expanded to approximately 500 on almost all major carriers, including several of Western's *amici* in this Court (TWA, Pan American, American). The expanded numbers also include, in addition to the Criswell respondents,[3] those *Stone* plaintiffs who were reinstated pending trial without opposition from Western (A113).

Western cites the 1984 decision by the FAA not to relax the Age 60 Rule for pilots, but omits mentioning that in the same proceeding the FAA determined not to extend the Age 60 Rule to flight engineers, 49 Fed. Reg. 14692, 14694-95 (April 12, 1984):

> After review of all the comments, the FAA is unable to determine that flight engineers should be subject to the same age limits as pilots in command and seconds in command. While a flight engineer has important duties which contribute to the safe operation of the airplane, he or she may not assume the responsibilities of the pilot in command. In the event of the incapacitation of the pilot in command, the second in command would be expected to assume command of the aircraft.
>
> • • • •
>
> The FAA has also determined not to propose an age beyond which flight engineers should not be permitted to serve. Available data is not sufficient in and of itself to support imposing a mandatory retirement age on flight engineers. The NTSB provided to the FAA air carrier accident/incident data in which the flight engineer was either a cause or a factor. The NTSB data for the years from 1962 through 1981 showed a total of 1,616 accidents/

[3] At trial, Western's Vice President of Flight Operations rated respondent Ron's performance after age sixty as "outstanding," and held Ron in "very high esteem" (Tr. 43, 2033).

> incidents, in which the flight engineer was cited as a cause in 13 cases and as a factor in 4 cases. It should be noted that, as FEIA states, the flight engineers involved in these accidents/incidents were younger than 60 years of age.

3. *The Medical BFOQ Evidence.* Western's medical testimony was presented by Douglas E. Busby, M.D., the former FAA Deputy Federal Air Surgeon who described himself as a professional witness for management (Tr. 1271). Dr. Busby was not qualified as an expert in aging, psychology, or cardiology (Tr. 1507-08). Dr. Busby was retained by Western in October 1979, long after the management determination to retire the Criswell respondents (Tr. 1511, 1514-15).

In addition to his principal admission that he would be comfortable with flight engineers over age sixty after just a one-day examination at his clinic (Tr. 1675-78), Dr. Busby also testified:

- average healthy people in their sixties can perform flight engineer duties (Tr. 1669-70)
- during his tenure at the FAA through 1979, he never advocated an age sixty limit for flight engineers (Tr. 1521)
- statistics do not support heart attacks as a concern, and the heart had very little weight in terms of his opinion in the case (Tr. 1667)
- the FAA-mandated examination system is safe (Tr. 1655)
- Western could increase the safety of its flight operations by administering pilot medical examinations (Tr. 1660-61; *see* PX 177 [J.A. 77]).

Respondents' experts were Stanley R. Mohler, M.D., and Donna Cohen, Ph.D. Dr. Mohler is Professor and Director of Aerospace Medicine at Wright State University. He has researched, written and lectured exten-

sively in the fields of aging, human factors in aviation, and accident causation (Tr. 576-89). In addition, Dr. Mohler is qualified as an air transport pilot (Tr. 598-99). It was undisputed that Dr. Mohler is highly qualified in aerospace medicine and aging.[4]

Dr. Cohen was Associate Professor in the Department of Psychiatry and Behavioral Sciences at the University of Washington at the time of trial (Tr. 973), specializing in the psychology of aging, cognition, and gerontology. Dr. Cohen was qualified to testify on psychomotor performance, intellectual skills, and cognitive changes with aging (Tr. 973-80). Dr. Cohen's views on the maintenance of function with increasing age are consistent with the views of the majority of experts in her field (Tr. 1096).

The District Court summarized respondents' expert testimony (A36):

> [P]hysiological deterioration is not caused by nor does it necessarily accompany aging between the ages of 60 and 70. There are a number of healthy individuals older than age 60 and it is not unusual for an individual over age 60 to be healthier than a much younger person. Deterioration is caused by disease and not by aging. The aging process itself, which commences at conception, occurs at different rates in different individuals and the differences

[4] Rather than confine itself to the present record where Western had ample opportunity to cross-examine Dr. Mohler during the two days he was on the stand, Western disparages testimony given by Dr. Mohler on deposition in another case (Br. 38 n.35). Western fails to note that the same district judge credited Dr. Mohler's testimony in yet another case, and found that "[h]is live testimony in the case-at-bar was extremely enlightening and persuasive." *EEOC v. Missouri Highway Patrol*, 555 F. Supp. 97, 105 n.2 (W.D. Mo. 1982), *rev'd*, 53 U.S.L.W. 2272 (8th Cir. 1984). Dr. Mohler's testimony was also credited in *EEOC v. County of Los Angeles*, 706 F.2d 1039, 1044 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 984 (1984).

> which result from these differential rates becomes increasingly pronounced in increasingly older age groups. Plaintiffs' expert on aerospace medicine also testified that it was feasible to determine on the basis of individual medical examinations whether flight deck crew members, including those over age 60, were physically qualified to continue to fly.

4. *The Operational BFOQ Evidence.* Western's system of training and checking utilizes sophisticated computerized simulators and other devices to evaluate its pilots and flight engineers. These devices have been perfected to such an extent that crewmembers may be fully trained in the simulator without the need to place the individual in an airplane (Tr. 2194-95). Western simulates virtually all emergency situations, including engine fires and electrical failures, which cannot be accomplished safely in an airplane (Tr. 520-21, 1531, 2196-98).

Through its training and simulator checking procedures, Western is able to evaluate vision, hearing, speech understanding, short and long term memory, learning ability, reaction time, ability to respond to emergencies, and even neurologic conditions which might impair performance (Tr. 2200-03, 2205-06; *see* Tr. 634-36).

Western's training devices are objectively reliable for persons of all ages, and enable the company to ascertain whether crewmembers can perform the required duties of the job safely and efficiently (Tr. 44-45, 450, 452, 531-32, 2213-14). If any questions arise as to the proficiency of a crewmember, additional or more frequent checks as well as in-flight evaluation may be given (Tr. 2205, 2210).

5. *Flight Safety Evidence.*[5] The incapacitation of a crewmember is an extremely rare event. The evidence

[5] There was no evidence regarding airline accidents as a function of flight engineer age. The limited evidence regarding pilot age and accidents showed a median age of 49 in pilot-related air

showed that such rare occurrences are not owing to events which Western sought to associate with age. Rather, they are caused primarily by gastrointestinal and other causes altogether unrelated to age (PX 160a [J.A. 117].) Moreover, the FAA and the airlines have procedures to assure that an incapacitation in flight will not jeopardize safety (A38):

> Even if the flight engineer were to become incapacitated in flight, the crew redundancy concept employed by Western and other carriers provides for other members of the flight deck crew to perform the necessary procedures of the flight engineer until the aircraft can be landed at the nearest available airport.[6] Although testimony at the trial indicated that a number of tragedies have resulted from pilot incapacitations during flight,[7] none has ever come about because of the incapacitation of a flight engineer.

The district court also made findings regarding the ability of the FAA and the airlines to deal with high-risk pilots safely on an individualized basis (A38):

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carrier accidents (PX 155 [J.A. 115]), and no adverse correlation between increased pilot age and general aviation accidents where the pilots had commercial or air transport certificates (PX 164 [J.A. 119]). The median age among major airline Captains on wide-body jets such as Western's DC-10's in 1978 was in the upper fifties (PX 163 [J.A. 118]).

[6] Western belittles its ability to conduct the flight safely if the Second Officer becomes incapacitated (Br. 34), despite the FAA *requirement* that Western make such safety arrangements. 14 C.F.R. § 121.385(d). The testimony of Western's own Chief Pilot is the source for the district court's finding that, in the event of a Second Officer incapacitation, Western trains its Captains and First Officers to perform required flight engineer duties and conclude the flight safely (Tr. 397).

[7] During the period 1962-1977, there were no reported accidents in scheduled domestic passenger service on U.S. air carriers in which the incapacitation of a pilot was a cause or a factor. In all, there were 12 accidents/incidents in which pilot incapacitation was a cause/factor in that period (PX 159 [J.A. 116]).

> The record also reveals that both the FAA and the airlines have been able to deal with the health problems of pilots on an individualized basis. Pilots who have been grounded because of alcoholism or cardiovascular disease have been recertified by the FAA and allowed to resume flying. Pilots who were unable to pass the necessary examination to maintain their FAA first class medical certificates, but who continued to qualify for second class medical certificates were allowed to "downgrade" from pilot to second officer. There is nothing in the record to indicate that these flight deck crew members are physically better able to perform their duties than flight engineers over age 60 who have not experienced such events or that they are less likely to become incapacitated.

C. The Downbidding Issue.

The controversy on Western began in 1977 when Starley expressed his desire to work beyond age sixty (A33):

> One year prior to his sixtieth birthday, Captain Starley learned that Western would soon have DC-10 second officer openings, resulting from the acquisition of new aircraft. After discussing the matter with Western's Vice President for Flight Operations [Robert Johnson], Captain Starley, in September 1977, submitted a bid for a DC-10 second officer position [Tr. 354]. In the following month, the bid was actually awarded to Captain Starley [Tr. 356] and he discussed with Western personnel the training normally given by Western to flight deck personnel who move from one position to another [Tr. 356-57].[8] In February 1978, Western changed its posi-

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[8] Starley spoke with both Johnson and William Newell, Western's Director of Flight, or "Chief Pilot," who later succeeded Johnson as Vice President of Flight Operations. Though Newell took no action to block Starley's Second Officer bid at the time, he was opposed to Starley's employment as a Second Officer (Tr. 358-61).

tion and, claiming that the position had been awarded to him in error, informed Captain Starley that he would be retired at age 60, which was the normal retirement age set forth in its pilot pension plan negotiated with ALPA.[9]

At trial Western's Chief Pilot admitted that, in canceling Starley's bid, Western singled him out because of age and used its pilot bidding procedures to discriminate on the basis of age (Tr. 449).

Criswell, like Starley, was a DC-10 Captain, having worked for Western for about 41 years (Tr. 476-78). Criswell submitted a bid to become a DC-10 Second Officer in December 1977 (Tr. 478-79). Upon learning of the denial, Criswell went to William Newell's office to lodge a complaint and find out the reason for Western's action (Tr. 479). Newell advised Criswell of his view that the bid should not be awarded, but said "it wouldn't be any different because everyone had to retire at age 60, anyway" (Tr. 481). The reasons for age sixty retirement, Newell told Criswell, were the FAA's Age 60 Rule and Western's pension plan. Criswell reminded Newell that the Age 60 Rule did not apply to Second Officers, and that Western could not rely upon its pension plan because of the ADEA amendments (Tr. 481-82). Newell responded, "Well, I guess you got me there" (Tr. 482).

Western contended that the refusal to allow Criswell and Starley to downbid to Second Officer was based on "reasonable factors other than age," 29 U.S.C. § 623(f)(1). Western relied upon a November 1978 decision of the Western Airlines Pilots System Board of Adjustment (A84), in which it was determined that Western did not

[9] Western's February 13, 1978 letter to Starley (PX 14, J.A. 91) constituted Western's decision to require Starley's retirement at age sixty (Tr. 58-59, 2056). Western then sent Starley another letter, dated March 6, 1978, canceling the Second Officer bid for the stated reason that the award had been made "in error" (Tr. 367).

violate a specific provision of the Pilot Agreement by refusing to honor the Criswell-Starley downbids. The Western members of the Board which passed on the Criswell and Starley grievances were Johnson and Newell (A90-91).

Western focused upon language in the System Board decision that it is "opposed to the principle of downbidding" and permits it "only in rare and carefully defined circumstances" (A88).[10] The district court found that the evidence at trial "belied this contention" (A41). The court went on to make extensive findings on the downbidding issue (A41-43):

> Western has permitted, and in certain circumstances required, downbidding in hundreds of instances in a wide variety of circumstances and almost without exception by younger pilots. The only circumstances in which Western has consistently denied downbids is by captains nearing age 60. During the period 1972 to 1979, Western has permitted downbids by or involuntarily downgraded more than 400 pilots. These included pilots downbidding from captain to first officer, from captain to second officer and from first officer to second officer, as well as downbids within status [PX 28 (J.A. 93-114); Tr. 429-34; *see* PX 5, Nos. 1-5, 10-11, 16-18 (J.A. 79-85)].

[10] Western's corollary argument was that it requires its pilots to "upgrade whenever possible" in a system of "up or out." The evidence showed that Western does not require its pilots to "upgrade whenever possible" or, in the new parlance of Western's brief in this Court, to follow a "natural line of progression." Western's pilots are not required to upgrade to the next higher status if the upgrading would result in a loss of pay, a reserve assignment, or a change of domicile (PX 5, No. 14 [J.A. 83]; Tr. 444, 1925). Moreover, all upgrading or "up and out" requirements are satisfied when a pilot first reaches Captain status, as a Captain on Western's lowest equipment does not have to aspire to be a Captain on higher equipment. Once a pilot has made Captain, there is no prohibition on downbidding (Tr. 1926-30).

Of special significance to this case is Western's policy, instituted in 1975, of medical downgrades. Under this policy a captain or second officer who cannot hold a FAA first class medical certificate but can hold a second class medical certificate is permitted to continue flying the line as a second officer. Four pilots have been downgraded by Western under this policy including a DC-10 captain who became a second officer at age 56 [Tr. 402, 411-13, 435-38, 1846-47]. Downgrades also have occurred as a result of "displacements," which are caused by curtailment of flights and flying time and consequent downward "bumping" by senior pilots whose flights have been cancelled [Tr. 402, 416, 1834-37, 1908, 1919]. Testimony indicated that at least on one occasion a displaced DC-10 captain who was high enough on the pilot seniority list to continue to hold on to a DC-10 captaincy was allowed to assume a DC-10 second officer position [Tr. 416-17].

Numerous downbids have also been exercised under the wide-body downbid provision of the Pilot Agreement. These are downbids which a pilot exercises in order to obtain a position on a wide-bodied aircraft. There is no restriction on the number of times a pilot can exercise such a downbid and a number of pilots have done so more than once [Tr. 444, 1910, 1924, 1970; PX 28 (J.A. 93); *see* PX 5, Nos. 10, 11 (J.A. 83)]. There was evidence also of a number of downbids permitted by Western, such as "hardship" downbids, which are not sanctioned by any provision in the Pilot Agreement, as is the case with disciplinary downgrades [Tr. 413-14, 441-42, 1912-13, 1916-17].

It is clear from the above evidence that Western's downbidding policy is not one of allowing downbids in only a few exceptional circumstances, but has sanctioned hundreds of downbids in a wide variety of circumstances including downbids and downgrades for reasons of health and unilateral downbids not approved by ALPA or the Pilot Agreement.

This downbid policy was administered in such a way as to have a disparate impact on pilots nearing their sixtieth birthday.

For these reasons, I find that Western's refusal to accept Captain Criswell's downbid to DC-10 second officer and its rejection of Captain Starley's downbid after it had been accepted, were not based on "reasonable factors other than age" and, in fact, such action was taken substantially and primarily because Criswell and Starley were approaching their sixtieth birthdays. Western had a policy of retiring all flight deck personnel—whether pilots or flight engineers—at age 60 and Western's actions in rejecting these downbids was in accordance with and motivated by that policy.

SUMMARY OF ARGUMENT

Western advocates a "rational basis" BFOQ test. It advocated this test below, relying on two cases that have since been reversed (*Tuohy*) or clarified (*Greyhound*) to eliminate reliance upon rational basis alone. Western now argues that the leading BFOQ case which has been followed by almost every circuit (*Tamiami*) actually supports a rational basis standard.

Tamiami and the cases that follow it do not endorse a standard of rationality only. Courts which have specifically construed the BFOQ phrase "reasonably necessary to the normal operation of the particular business" have found the rational basis test insufficient to satisfy the statutory standard. Western did, too, when it proposed its alternative BFOQ instruction at trial, fully recognizing that *Tamiami* places the burden on defendant to prove that it is highly impractical to assess the safe job performance of persons in the disqualified age group on an individualized basis.

Two of the three elements of the *Tamiami* test were not in issue in this case. The "essence" or *Diaz* prong

requires that the job qualifications be reasonably related to the essence of the particular business, here safe transportation of passengers by air. There was no dispute in this case over whether the *Diaz* prong was met. The jury was directed that the normal operation or essence of Western's business is the safe transportation of air passengers, so no error can be claimed.

The second (*Weeks*) prong of the *Tamiami* test has two parts. The first part requires the employer to prove that it has a reasonable cause, that is, a factual basis, for believing that all or substantially all persons over the proscribed age limit would be unable to perform safely the duties of the job involved. Western did not contend that all or substantially all age sixty flight engineers could not perform the job safely and tendered no instruction on this point. Accordingly, it was omitted from the court's BFOQ instruction and was never in issue.

The *Weeks* prong of the *Tamiami* test alternatively requires the employer to prove that it is highly impractical to assess the safe job performance of persons over the proscribed age limit on an individualized basis. This is the BFOQ test almost universally applied, and the one given to the jury here based on Western's backup BFOQ instruction. The evidence from Western's own experts was that Western can assess the ability of age sixty flight engineers to perform the job safely, both from a medical and operational point of view. Moreover, in retiring the Criswell respondents Western simply did not make the safety judgment which is the basis of its argument here.

Western's safety obligations as an air carrier were fully accounted for in the instructions and, more importantly, in the evidence presented at trial. Western emphasized the FAA's "Age 60 Rule" in its BFOQ defense, and also emphasized its emergency flight procedures. These matters, and the regulation of Western as

a certificated air carrier, do not entitle Western to a *per se* BFOQ as a matter of law. Congress did not exempt air carriers from the ADEA's coverage or from the requirement—reinforced by the 1978 ADEA amendments—that airline age BFOQ's be decided by a jury the same as any other issue of fact.

The "reasonable factors other than age" defense was correctly classified as an affirmative defense in this case. First, where the defense is an asserted classwide practice, an adjunct of an admittedly discriminatory policy of mandatory retirement based on age, as here, it is an affirmative defense for which the defendant bears the burden of proof, the same as with the "factor other than sex" defense under the Equal Pay Act. Second, the instructions placed the burden of proof on plaintiffs to prove that age was a determining factor in the denial of the downbids, and did not place the burden on Western to prove the negative of that formulation. Third, Western used the System Board decision upholding the denial of the Criswell-Starley downbids as a sword, rather than a shield, in justifying its actions. Plaintiffs' evidence examined the entire spectrum of pilot movement to show that Western allowed downbidding by younger pilots in many and varied circumstances but never by pilots approaching age sixty. Western denied this, and in addition asserted affirmatively that, regardless of plaintiffs' evidence of discrimination, the System Board found that Criswell and Starley were not entitled to downbid under a particular contractual provision. Fourth, Western bore the burden of proof on the business necessity defense to respondents' disparate impact claim. Western's business necessity defense included its pilot contract and System Board evidence, the same evidence offered in support of the reasonable factors other than age defense.

ARGUMENT

I. THE JURY WAS CORRECTLY INSTRUCTED UNDER THE *TAMIAMI* BFOQ STANDARD.

The ADEA provides that it is unlawful to discriminate against an individual in his employment "because of . . . age." 29 U.S.C. § 623(a).[11] The ADEA also provides that it is not unlawful for an employer to take any action otherwise prohibited by the Act "where age is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1).

The BFOQ test almost universally applied, and the one applied throughout this case, is that enunciated in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976). Western purports to espouse the *Tamiami* standard and says that it is "workable," but the test Western really advocates neither is the *Tamiami* test nor is it workable in preserving the statutory requirement of a "reasonably necessary" BFOQ. Under the "rational basis" BFOQ test that Western proposes, there is effectively no check on an employer that articulates a safety belief for its discriminatory policy. Western suggests no instance in which such a BFOQ might be overcome, except that perhaps Western would not tolerate total irrationality. But even that would be difficult if not impossible to overcome, because Western has added two more ingredients to its BFOQ broth: (1) juries—and, by necessary implication, trial and appellate courts—are not to sit in review of the bona fides of an employer's safety

[11] By reference to a government report preceding the passage of the ADEA, Western implicitly argues (Br. 14-15 n.6) that the Act did not have as its target invidious age discrimination. Those early observations notwithstanding, Congress in 1967 passed the ADEA with substantive provisions derived *in haec verba* from Title VII. *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). Courts have construed ADEA and Title VII consistently in matters of substance and methods of proof.

decisions; and (2) because employers like Western have general statutory safety obligations in connection with their business, their BFOQ judgments are presumptively valid as an adjunct of those obligations.

The notion of a *per se* BFOQ based on a standard of subjective rational belief alone is repugnant to the ADEA statutory scheme. As an exception to a remedial statute, the BFOQ is to be narrowly construed. *Orzel v. City of Wauwatosa*, 697 F.2d 743, 748 (7th Cir.), *cert. denied*, 104 S. Ct. 484 (1983); *Smallwood v. United Air Lines, Inc.*, 661 F.2d 303, 307 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982); *Air Line Pilots Association, International v. Trans World Airlines, Inc.*, 713 F.2d 940, 951 (2d Cir. 1983), *cert. granted sub nom. Trans World Airlines, Inc. v. Thurston*, 104 S. Ct. 1412 (1984) (No. 83-997); *see Dothard v. Rawlinson*, 433 U.S. 321, 324 (1977) (Title VII).[12] Adoption of Western's construction of the statute truly would "permit the exception to swallow the rule." *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 387 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971); *see Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 235 (5th Cir. 1969).

Nor are there public safety or public policy reasons to eviscerate the statute by adopting Western's BFOQ test. Indeed, it is difficult to conceive of an ADEA BFOQ defense that would not implicate safety.[13] Since the en-

[12] Western cites to Labor Secretary Wirtz' testimony (Br. 16 n.9) that the BFOQ provision in the ADEA is "obviously broad" for the proposition that the exception should not be narrowly construed against the employer asserting it. There is nothing in the Secretary's less than elucidating reference to suggest that he was talking about statutory construction in the context of judicial review.

[13] The Department of Labor, the original ADEA enforcement agency, cited as possible BFOQ's actors for youthful or elderly roles, and persons used to advertise or sell products aimed at the youth or elderly market, 29 C.F.R. § 860.102(e) (1969), but respondents are not aware of any cases in which such asserted BFOQ's were challenged.

actment of the ADEA, and particularly since the enactment of the 1978 ADEA amendments, the statutory scheme has worked well in resolving BFOQ conflicts under the true *Tamiami* standard embraced by almost all courts to deal with the issue.

A. Western Has Distorted The *Tamiami* BFOQ Test.

Western argues that the *Tamiami* BFOQ test has been "clarified" in *EEOC v. University of Texas*, 710 F.2d 1091 (5th Cir. 1983), so that to prevail, "an employer need only demonstrate a factual basis for its belief that individual evaluations cannot practically separate the qualified from the unqualified" (Br. 25). This argument distorts the *Tamiami* standard which, in the original, places the burden squarely on defendant to prove, 531 F.2d at 236 (emphasis in original):

> whether it had reasonable cause, that is, a factual basis, for believing that all or substantially all persons over 40 would be unable to perform safely and efficiently the duties of the job involved, *or* whether it is impossible or impractical to deal with persons over 40 on an individualized basis.

See Orzel, 697 F.2d at 754.

The above aspect of the *Tamiami* test is derived from *Weeks*, which clearly separates the two elements so that the "factual basis for believing" phrase does not go with the "impossible or impractical" clause. The latter is set forth separately in a footnote in *Weeks*, 408 F.2d at 235 n.5: "It may be that where an employer sustains its burden in demonstrating that it is impossible or highly impractical to deal with women on an individualized basis, it may apply a reasonable general rule."

The selection Western quotes from *University of Texas* (Br. 25) mistakenly paraphrases *Tamiami* by placing the word "either" after the "factual basis for believing" phrase instead of before it. There is no analysis indicating an intentional departure from *Tamiami*, so the Fifth Circuit hardly could have "unequivocally held" (Br. 25) that it was no longer requiring defendants to prove the "impossible or impractical" element by a preponderance of the evidence. Indeed, later in the *Texas* opinion the court states that under this element the employer "must demonstrate . . . that it is impossible or impractical to deal with persons over forty-five on an individualized basis," and that the state "endeavored to demonstrate that it is impossible or impractical to screen applicants on an individualized basis." 710 F.2d at 1096, 1097. Any doubt in the matter was resolved by the recent Fifth Circuit opinion in *Levin v. Delta Air Lines, Inc.*, 730 F.2d 994, 998 (5th Cir. 1984), in which the court stated that the inquiry "mandated by *Tamiami*" was whether the airline had a factual basis for believing that all or substantially all pregnant flight attendants would be unable to perform job duties safely and efficiently "*or* whether it is impossible or impractical to deal with [pregnant flight attendants] on an individualized basis."[14]

B. The *Tamiami* BFOQ Test Was Correctly Embodied In The Jury Instructions.

The *Tamiami* test has two prongs. Under the first prong derived from *Diaz*, the employer must show that the job qualifications which the employer invokes to

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[14] The three other cases besides *Texas* cited by Western do not support the argument that the Fifth Circuit or other courts have altered the *Tamiami* test. *Johnson v. American Airlines, Inc.*, No. 83-1610 (5th Cir. Nov. 8, 1984) merely quoted from *Texas* the same selection contained in Western's brief, so that adds nothing. In *Tuohy v. Ford Motor Co.*, 675 F.2d 842 (6th Cir. 1982), the entire thrust of the opinion is to reject the rational basis BFOQ test which Western espouses here. Finally, though the concurring opinion in *Hoefelman v. Missouri Department of Conservation*, 718 F.2d 281 (8th Cir. 1983), by ellipsis links the "factual basis for believing" phrase with the individualized assessment standard, the majority opinion paraphrases the *Tamiami* burden correctly. 718 F.2d at 283.

justify his discrimination "must be reasonably *necessary* to the normal operation—the essence" of the particular business, which in *Diaz* was defined as the safe transportation of air passengers. *Tamiami*, 531 F.2d at 235-36 and n.27. This prong was given almost word for word in the jury instruction here (J.A. 61), as the district court intended (Tr. 2240-41, 2369-73). Inasmuch as the district court directed on this issue by instructing the jury that the essence of Western's business is safe air passenger transport, no error can be claimed. Western's argument that the jury was not instructed on the *Diaz* prong (Br. 36) is not only flatly wrong, it is inconsistent with Western's objection at trial to the inclusion of any instruction construing the statutory phrase "reasonably necessary to the normal operation of the particular business" (R. 164).[15]

Under the second prong of the *Tamiami* test, derived from *Weeks*, there are two elements to the employer's burden of proof, 531 F.2d at 236:

> whether it had reasonable cause, that is, a factual basis, for believing that all or substantially all persons over 40 would be unable to perform safely and efficiently the duties of the job involved, *or* whether it is impossible or impractical to deal with persons over 40 on an individualized basis.

The court stated that "one method" by which an employer can meet its burden under the "impossible or impractical" element is to "establish that some members of the discriminated-against class possess a trait precluding safe and efficient job performance that cannot be ascertained by means other than knowledge of the applicant's membership in the class." 531 F.2d at 235.

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[15] Ironically, Western now proposes delineating the BFOQ elements separately (Br. 28 n.24). When respondents proposed this format in their BFOQ instruction (R. 157), Western objected.

With exception of the "all or substantially all" element of the *Weeks* prong, all of the above essential ingredients of the *Tamiami* test were embodied in the BFOQ instruction which was based on Western's alternative BFOQ instruction (*see* pp. 6-7, *supra*).[16] Even though the "all or substantially all" element is the only part of the *Tamiami* test which rests on a belief standard, and even though *Tamiami* describes it as the "main method" of proving a BFOQ under *Weeks*, 531 F.2d at 228 n.8, Western did not make any contention on this element or include it in its alternative BFOQ instruction. Accordingly, Western was not put to its proof on this element in the BFOQ instruction.

Consistent with *Tamiami* and its progeny, the BFOQ instruction placed the burden on Western to prove the essential elements of this affirmative defense. But the instruction in no way required Western to prove the existence of a BFOQ to a "certainty" (Br. 42). The standard was the traditional civil standard of preponderance of the evidence (J.A. 56).

C. Western's Proposed "Rational Basis" BFOQ Standard is Contrary to the Statutory Requirement That a BFOQ Be "Reasonably Necessary to the Normal Operation of the Particular Business."

The "rational basis" BFOQ test advocated by Western tracks, without direct attribution, the district court opinion in *Tuohy v. Ford Motor Co.*, 490 F. Supp. 258 (E.D. Mich. 1980), *rev'd*, 675 F.2d 842 (6th Cir. 1982). It was in reliance on this decision that Western argued below

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[16] Western italicizes the "and" which joins the two subparagraphs of the *Weeks* prong in the BFOQ instruction (Br. 9) as if to argue that the instruction unfairly imposed an additional burden on it. Examination of the instruction Western tendered reveals that Western, not the court or respondents, placed the conjunction there (R. 184). Further, although the district court did substitute phrases in the two *Weeks* subparagraphs, it was done to include terms of art directly from the *Tamiami* opinion.

that the FAA's Age 60 Rule for pilots constituted a "*per se* reasonable" BFOQ for flight engineers as a matter of law (pp. 4-6, *supra*). The district court in *Tuohy* reached that conclusion with respect to a corporate pilot not covered by the Age 60 Rule. 490 F. Supp. at 264. The court decided that, notwithstanding the *Tamiami* test, when there was conflicting evidence and the employer relied on the Age 60 Rule, the ADEA "did not mean to force employers to be any more than 'reasonable' in their decisions in this area." 490 F. Supp. at 262-63. The court felt it had "no choice but to find that defendant's rule is a reasonable one," and further inquiry was foreclosed because "a jury should not be permitted to speculate" on the sufficiency of medical evidence where third party safety interests are involved. 490 F. Supp. at 264. This, of course, is precisely Western's argument.

The Sixth Circuit reversed and, by embracing the traditional *Tamiami* BFOQ test as it is applied in the safety context, rejected the district court's BFOQ test based on rationality alone. The court of appeals stated that, when an employer seeks to impose a BFOQ based on third party safety claims, "a particular inquiry into the effect of aging on the ability to perform safely is called for." 675 F.2d at 844. The court held, 675 F.2d at 845:

> The statutory defense upon which Ford relied requires by its very terms that an occupational qualification be not only bona fide, but also "reasonably necessary." We agree with the plaintiff that the disputed factual issue in the present case is a material one because it is concerned precisely with whether Ford's adopted age 60 rule is reasonably necessary. The Age 60 Rule which the FAA has never seen fit to apply to corporate pilots does not foreclose further inquiry.

The Sixth Circuit's decision in *Tuhoy* was followed by the Seventh Circuit in *Orzel*. The *Orzel* opinion is especially relevant because of its clarification of an early Seventh Circuit BFOQ case which is the source for the heart of Western's proposed "rational basis" BFOQ instruction (R. 164). *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859, 863 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975). Defendant in *Orzel* claimed error in the use of the *Tamiami* test below, and contended, in reliance on language from *Greyhound*, that it need only show a "good faith judgment" concerning safety which is "not the result of an arbitrary belief lacking in objective reason or rationale." 697 F.2d at 752. The *Orzel* court rejected such an expansive reading of *Greyhound*, and adopted the *Tamiami* test as consistent with the *Greyhound* mandate. 697 F.2d at 753-54. The court also distinguished the standard of rationality in the legislative context from the "strict requirements of the ADEA," 697 F.2d at 749: "Under the ADEA . . . compulsory retirement schemes must not only be arguably rational; they must also be *reasonably necessary* to the normal operation of the particular business in question." *See also Starr v. FAA*, 589 F.2d 307, 313 (7th Cir. 1978); *EEOC v. County of Santa Barbara*, 666 F.2d 373, 376 n.8 (9th Cir. 1982).

The court of appeals was correct in rejecting Western's rational basis BFOQ test as insufficient to satisfy the statutory requirement of reasonable necessity (A10-11). Under *Tamiami* and the cases that follow it, there is sufficient flexibility to take into account the safety factor without compromising the strict requirements of the statute. The statutory scheme as applied under the *Tamiami* standard in the safety context has worked well, and Western has offered no legitimate reason to tamper with it.

D. Western's Obligations As a Certificated Air Carrier Were Fully Accommodated in the Instructions and in the Evidence.

There was no error in the district court's failure to give a specific instruction on the "highest possible degree of safety" language in the Federal Aviation Act, 49 U.S.C. § 1421(b) (A12). The BFOQ instruction emphasized safety in each of its elements, and in particular the *Diaz* or "essence" element, which "adjusts to the safety factor." *Tamiami*, 531 F.2d at 236. Here the district court made the necessary adjustment by directing the jury that the "essence" of Western's business is the "safe transportation of air passengers." [17]

Western barraged the court with numerous instructions which essentially were legal briefs stating the same contentions it makes in this Court regarding the FAA's Age 60 Rule and the Federal Aviation Act (R. 164, Nos. 13.1, 13.2, 13.3, 16.1, 16.5, 19, 19.1, 19.2). As is clear from its BFOQ evidence (*see, e.g.*, Tr. 1486-1505), Western was given full opportunity to present these contentions at trial. Where the essential elements of an ADEA case were correctly presented in the instructions as a whole, *Kelly v. American Standard, Inc.*, 640 F.2d 974, 985 n.18 (9th Cir. 1981), and where Western's theories were sufficiently brought home to the jury in direct testimony and cross-examination (*see, e.g.*, Tr. 779-96), there was no requirement to repeat Western's contentions in the jury instructions or to give them special emphasis.

[17] Contrary to Western's statement (Br. 42 n.39), Judge Tashima did not avoid dealing with Western's request to incorporate the appropriate safety references in the BFOQ instruction. The question was discussed extensively in the instruction conference (Tr. 2368-78, 2393-94), and the court explained its reliance on the *Diaz* "essence" element as accomplishing the accommodation between the ADEA and the Aviation Act. The "too many areas" (Tr. 2378) that Judge Tashima did not want to get into involved repeating parties' contentions in the instructions, which the court was not required to do.

United States v. Rothman, 567 F.2d 744, 752 (7th Cir. 1977); *Beard v. Mitchell*, 604 F.2d 485, 497 (7th Cir. 1979).

Western also argues that it was not accorded discretion in the jury instructions to select job qualifications in light of the safety risks. There are three things wrong with this argument. First, the discretion Western wants would effectively take the case away from the jury. In 1978 the ADEA was strengthened in 29 U.S.C. § 626(c)(2) to assure a trial by jury "of any issue of fact." In the same Congress the Senate adopted an amendment to the BFOQ provision designed to codify the *Tamiami* test.[18] In conference, the amendment was withdrawn because the conferees agreed that it neither added to nor changed existing law.[19] In these circumstances, there is no basis for taking airline BFOQ issues away from a jury or treating them differently from any other issue of fact under the ADEA.

Second, there was no dispute in this case over whether Western could set stringent job qualifications for the Second Officer position or whether the duties of the Second Officer were reasonably necessary. Inasmuch as the court instructed the jury that the *Diaz* prong had been met (J.A. 61) and inasmuch as Western objected to any *Diaz* prong instruction construing the phrase "reasonably necessary to the normal operation of the particular business," Western cannot now be heard to complain that the court did not include its contentions in a portion of the *Tamiami* instruction which was not even in issue.

Third, Western incorrectly confuses the leeway granted employers under *Diaz* to set stringent job qualifications in a safety context, *see Tamiami*, 531 F.2d at 236, with

[18] S. Rep. No. 493, 95th Cong., 1st Sess. 10-11 (1977), *reprinted in* 1978 U.S. CODE, CONG. & AD. NEWS 504, 513-14.

[19] H. Conf. Rep. No. 950, 95th Cong., 2d Sess. 7 (1978), *reprinted in* 1978 U.S. CODE, CONG. & AD. NEWS 528, 529.

its desire to set more onerous age limitations. Classifying the age limitation itself as a stringent job qualification under *Diaz* effectively begs the ultimate question of reasonable necessity.[20] Under the correct reading of *Diaz*, the greater leeway which accompanies a greater safety factor is in setting more stringent job duties, not in establishing the age classification itself under *Weeks*.[21]

Working within the *Tamiami* framework, courts can flexibly conduct BFOQ inquiries in important public safety matters without diluting the statutory scheme. Two recent examples of how courts tailor the *Tamiami* inquiry to safety issues in the airline industry are *Monroe v. United Air Lines, Inc.*, 736 F.2d 394 (7th Cir. 1984), *pet. for cert. filed*, 53 U.S.L.W. 3406 (U.S. Nov. 8, 1984) (No. 84-774), and *Levin*. In *Monroe*, the court directed the BFOQ inquiry to the issue of whether an incapacitated Second Officer would endanger the flight. 736 F.2d at 405. In *Levin*, the court noted as relevant to the BFOQ inquiry whether or not the airline allows persons of comparable medical risk to fly. 730 F.2d at 999. These very issues were before the jury in this case, as were all of Western's contentions regarding the FAA's

[20] Without citation of authority, Western suggests that the term "BFOQ" is best understood to mean a "trait (*e.g.*, age under 40)" against which the required level of job competence is measured, and that if such a trait is effective in screening out unqualified persons, the BFOQ test is met. Under this logic, any such "trait" will satisfy the test, either at age 50 or 40 or 30, because establishing the "trait" will necessarily exclude the unqualified as well as the qualified among those over the age limit.

[21] The statement in *Tamiami* that the *Diaz* prong rather than the *Weeks* prong "adjusts to the safety factor," 531 F.2d at 236, of course does not mean that safety is not taken into account in the *Weeks* prong. Obviously, the practicality of individualized assessment must be measured in the particular safety environment. It was precisely in the context of Western's business as a certificated air carrier that the jury and the courts below found that Western could assess the performance of age sixty Second Officers on an individualized basis (*see* pp. 9, 11-19, *supra*).

Age 60 Rule and its duties as a regulated air carrier. Thus, Western's ADEA and air carrier safety obligations were fully accommodated in this case.

II. THE "REASONABLE FACTORS OTHER THAN AGE" PROVISION IN THE ADEA IS AN AFFIRMATIVE DEFENSE.

Western contended at trial that its actions in canceling or refusing the Criswell-Starley downbids were not unlawful because those downbids were unavailable under a particular provision of the pilot agreement (Jury Inst. No. 30; J.A. 62). Respondents showed that the denial of their downbids before age sixty was inseparably bound to the company's refusal to employ any flight engineers after age sixty. Respondents Ron and White, who were employed as career flight engineers, were not permitted to serve past sixty even though no downbidding was required.[22]

The evidence at trial was that, in actual practice, more than 400 pilots under age sixty had been permitted to downbid under a wide variety of circumstances, including personal preference, hardship, medical ineligibility for continued captain status, and reductions in force. At trial, the transfer mechanism was shown to be available for those who wished or needed to downbid to lower cockpit positions. Age sixty pilots, however, stood alone in having been denied the downbidding benefits otherwise flowing from their seniority.

A. The "Reasonable Factors" Exception in the ADEA Is A Defense to the Prohibition Against Age Discrimination; the Employer Bears the Burden of Proof.

Section 4(f)(1) of the ADEA, 29 U.S.C. § 623(f)(1), provides that, even where an employer's actions violate

[22] Both were reinstated *pendente lite* pursuant to preliminary injunctions entered by the court. Ron has subsequently retired; White is presently employed as a DC-10 flight engineer.

the prohibitions of Section 4(a), 29 U.S.C. § 623(a), such actions are nevertheless not unlawful "where the differentiation is based on reasonable factors other than age" (RFOA). This "exception" to the Act's prohibitions immediately follows (as part of the same sentence) the "bona fide occupational qualification" (BFOQ) defense in § 623(f)(1) and immediately precedes the "bona fide employee benefit plan" defense in Section 4(f)(2), 29 U.S.C. § 623(f)(2). Congress' placement of the RFOA exception in the statute, lodged between two well-established affirmative defenses, as well as among several other defenses to the prohibited conduct which immediately precedes it, all counsel that the RFOA defense should be treated consistently with other defenses in Section 4(f) of the Act, 29 U.S.C. § 623. Even more, the characterization of the RFOA, along with the BFOQ and pension plan defenses, as exceptions to the conduct otherwise made unlawful under ADEA Section 4(a), requires that the RFOA be likewise treated as an affirmative defense, the burden of proving which rests on defendant. Notwithstanding the foregoing, Western argues that the RFOA defense is nothing more than a denial of plaintiffs' prima facie case. According to Western, whereas the burden of proving the BFOQ and pension plan defenses rests on the employer, plaintiff bears the burden of identifying and disproving the applicability of all facts asserted to be "reasonable factors other than age."

The legislative history, substantive provisions, and enforcement mechanism in the ADEA reflect liberal borrowing from the prohibitions, defenses, and enforcement mechanism of both the Fair Labor Standards Act (FLSA) and Title VII of the Civil Rights Act of 1964. As for the ADEA's "reasonable factors other than age" defense, Section 6(d) of the FLSA, 29 U.S.C. § 206(d), as amended in 1963 (the Equal Pay Act) provides, as a defense to the requirement of equal pay for equal work for employees of opposite sexes, that differences in wage

rates are excused when "pursuant to a differential based on any other factor other than sex."

It is well established that, where plaintiff has carried the burden of showing a wage differential among persons of opposite sex for equal work, "the burden shifts to the employer to show that the differential is justified" based on "any other factor other than sex" or one of the Act's three other exceptions. *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974); *Thompson v. Sawyer*, 678 F.2d 257, 271 (D.C. Cir. 1982) (burden shifts to employer to show pay differential is justified by one of exceptions); *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1136 (5th Cir. 1983) (for exceptions, employer has burden of production and of persuasion); *Bence v. Detroit Health Corp.*, 712 F.2d 1024, 1029 (6th Cir. 1983), *cert. denied*, 104 S.Ct. 1282 (1984) (once plaintiff establishes prima facie case, burden shifts to employer to justify differential treatment by one of the Act's four exceptions); *EEOC v. Central Kansas Medical Center*, 705 F.2d 1270, 1272 (10th Cir. 1983); *Guthrie v. Lady Jane Collieries, Inc.*, 722 F.2d 1141 (3d Cir. 1983).

The assignment of the burden of proof to defendant for statutory exceptions is consistent with the general rule that the application of an exemption under the Fair Labor Standards Act is a matter of affirmative defense on which the employer has the burden of proof. *Corning Glass Works*, 417 U.S. at 196; *A.H. Phillips v. Walling*, 324 U.S. 490, 493 (1945); *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *Walling v. General Industries Co.*, 330 U.S. 545, 547-48 (1947); *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290, 295 (1959). The U.S. Department of Labor, charged with enforcement of the equal pay provisions of the Fair Labor Standards Act when enacted in 1963, has interpreted the Act consistently:

> If [the employer] relies on the excepting language to exempt a differential in pay for the operation of

> the equal pay provisions, he will be expected to show the necessary facts.

29 C.F.R. § 800.141(a) (1984). Similarly, both federal agencies which have enforced the ADEA have consistently interpreted the statute to assign the burden of establishing the RFOA defense to the employer. EEOC Guidelines, 29 C.F.R. § 1625.7(e) (1983) (". . . the employer bears the burden of showing that the 'reasonable factor other than age' exists factually"); Wage and Hour Division Guidelines, 29 C.F.R. § 860.103(e) (1983) (reasonable factors other than age exception "must be construed narrowly, and the burden of proof . . . will rest upon the employer"). These interpretations by the agencies charged with enforcement of the statute are traditionally accorded "great deference." *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

Not only is construction of the RFOA as part of plaintiff's burden inconsistent with the location of the provision in the statute, the construction of other provisions in surrounding statutory defenses, and the case law under analogous provisions under both the FLSA and ADEA (BFOQ and pension plan exceptions), but petitioner's construction would render superfluous the statutory provision itself. That is because, if the RFOA defense is nothing more than a denial of plaintiff's prima facie case with evidence that age was not a determining factor because other, more compelling factors were involved, then the RFOA defense adds nothing to a denial of plaintiff's prima facie case.

The two cases cited by Western in support of its contention that the burden of proving its RFOA defense was incorrectly assigned do not support its position. In *Marshall v. Westinghouse Electric Corp.*, 576 F.2d 588, 590 (5th Cir. 1978), the employer denied it had terminated its employee because of his age, and contended that he was unable to keep up with paperwork and had difficulties in servicing customer complaints. The Fifth

Circuit upheld the trial court's determination that "age was not a factor in Eldon's discharge," implicitly concluding either (1) that plaintiff had failed to establish his prima facie case; or (2) that defendant had satisfied its burden of articulating nondiscriminatory factors in support of its actions, thus requiring plaintiff to come forward with proof of pretext demonstrating that defendant's evidence was untrue or unworthy of belief.

In the context of those facts, the court concluded that the "differentiating factors other than age" exception is not a "burden shifting exception []." Contrasting the defense with the BFOQ defense (which is "in the nature of confession and avoidance"), the Court held that the RFOA defense was not an affirmative defense, but rather was equivalent to a denial of plaintiff's prima facie case.[23]

Similarly, in *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1007 (1st Cir. 1979) plaintiff, a sales manager, was discharged allegedly because of his age. The employer denied discrimination and asserted a "reasonable factors" defense. The court of appeals concluded that the trial court had erred in failing to assign the correct burdens to the parties. Here again, as in *Westinghouse*, the employer's so-called RFOA defense was no more than a redundant denial that age played a part in plaintiff's termination.

B. Given Its Specialized "Reasonable Factors" Defense in This Case, It Is Particularly Appropriate To Assign the Burden of Proof to Western.

Western's RFOA defense is in marked contrast to those asserted in *Westinghouse* and *Loeb*. Here, Western has asserted an age limitation policy barring cockpit

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[23] Significantly, the court noted that the burden is assigned to defendant in BFOQ cases because "the establishment of a BFOQ necessarily has an effect beyond the case being litigated since it permits an employer to deal with an entire class of persons on an age-related basis in derogation of the statute." *Westinghouse*, 576 F.2d at 591 n.3.

service after sixty. Western also has asserted an additional defense which, unlike those in *Westinghouse* and *Loeb*, did not simply deny respondents' allegations, but also asserted that, irrespective of plaintiffs' proof, provisions in Western's collective bargaining agreement otherwise operated as a bar to plaintiffs' action. This defense—analogous to a confession and avoidance characterizing a BFOQ defense—is a paradigm of a defense having an effect far beyond the case being litigated "since it permits an employer to deal with an entire class of persons on an age-related basis in derogation of the statute." *Westinghouse*, 576 F.2d at 591 n.3.

Assigning the burden of proof to defendant in establishing a RFOA defense is particularly appropriate in this case. Here, Western did not deny it had taken actions against respondents because of their age. Indeed, implicit in the assertion of its BFOQ defense was Western's admission that age was a factor in its decision to deny plaintiffs continued employment. Instead, Western contended that, for the Captain plaintiffs (Criswell and Starley), it had additional contractual reasons for denying their downbids, including a decision of the System Board of Adjustment, constituting "reasonable factors other than age."

Construing Western's RFOA evidence as an affirmative defense is required here, since it was that same evidence which Western previously advanced in support of an affirmative defense for which it bore the burden of proof. In its brief to the court of appeals, for example, Western characterized its pilot contract defense, as well as its contentions that plaintiffs' action was barred by the System Board's determination as a matter of law, as a "bona fide seniority system" defense (BFSS) under ADEA § 4(f)(2), 29 U.S.C. § 623(f)(2). While the BFSS issue is not presented here, Western has sought to recast its BFSS evidence, including its specialized defense based on the System Board decision, under the

umbrella of a RFOA, and to extricate itself from the burden of proof it had earlier assumed.

Western's "reasonable factors" defense—presented as a sword rather than as a shield—is not the sort of mere denial of discrimination characterizing the facts in *Westinghouse* and *Loeb*. Those cases assigned the burden to plaintiff in the context of a defense unnecessarily or incorrectly raised. Where the substance of the defense is nothing more than a denial of discriminatory treatment, the RFOA defense is redundant with denial of discrimination in the first instance. But where, as here, an employer admits of facts constituting a prima facie case of age discrimination, and where the employer seeks to immunize its conduct on the basis of a generalized rule applicable to a group of employees similarly situated, the employer should—as with the BFOQ, pension plan, and seniority system defenses—bear the burden of proving the applicability of such defense by a preponderance of the evidence. As the court of appeals below noted in declining to follow the Fifth Circuit's reasoning in *Westinghouse*, the reasonable factors defense is "an affirmative defense for which the employer bears the burden of proof . . . . [W]e do not believe that a statutory exception may be properly analogized to the second stage of the case-in-chief under a disparate treatment theory. . . ." (A17).

C. The Trial Court Appropriately Assigned The Burdens of Proof on the Downbidding Issue.

Trial Judge Tashima correctly assigned the burdens of proof in this case. First, the trial court explained to the jury that defendant both denied violations of the ADEA and also contended that its actions were not unlawful because age was a BFOQ and because the "differentiation is based on reasonable factors other than age" (Inst. No. 23, J.A. 57). The court went on to instruct that

plaintiffs had made a "prima facie" showing under the ADEA, which required the jury to go on to consider defendant's evidence that its actions were not unlawful (Inst. No. 24, J.A. 57).

Contrary to Western's suggestion that the trial court assigned to it the burden to prove that age was not a determining factor (Br. 46), the trial court clearly and correctly assigned to plaintiffs the burden of proving discriminatory treatment on the basis of age by a preponderance of the evidence, including evidence of discriminatory motive or intent (Inst. No. 25, J.A. 58). In explaining the "reasonable factors" defense, the court did not expressly assign the burden of proof to defendant. Instead, Judge Tashima explained that Western contended that its actions against plaintiffs Criswell and Starley were not unlawful because they were based on a particular provision of the pilot agreement, and that although this was a "reasonable factor other than age," it was for the jury to determine "whether, taking the evidence as a whole, age was a substantial and determinative factor—in Western's refusal to allow either plaintiff to work as a Second Officer." (Inst. No. 30, J.A. 62-63). It is significant here that, unlike the court's assignment of the burden of proof to defendant in the BFOQ instruction (Inst. No. 28, J.A. 61), the "reasonable factors" instruction is silent as to the burden of proof, but simply describes defendant's RFOA defense as supported by evidence which must be considered as part of the overall inquiry.[24]

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[24] Early in the instructions, the court assigned to plaintiffs the burden of proving "each essential element of their claim by a preponderance of the evidence," while assigning to Western the burden of establishing the essential elements of its "affirmative defenses" by a preponderance of the evidence. Contrary to Western's contentions, the trial court never described the RFOA as an "affirmative defense," and unlike its treatment of the BFOQ defense, never specifically assigned the RFOA burden of proof to defendant. (Inst. No. 17, J.A. 56).

D. Western Had the Burden of Proving Its Contract/System Board Defense As A Business Necessity in Response to Plaintiffs' Disparate Impact Showing.

Although the trial court correctly assigned the various burdens of proof in this case, assignment of the RFOA burden had no likely effect on the outcome of the trial. This is so because, regardless whether the RFOA burden was correctly assigned, Western bore the burden of proving business necessity for its no-downbidding practices in response to plaintiffs' disparate impact showing.

Under the disparate impact model of proof, respondents established that, even assuming that neutral provisions in the pilot agreement barred certain types of downbidding, those provisions impacted more heavily (here, solely) on pilots at or approaching age sixty. Under the rule established in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), once plaintiff establishes a disparate impact on the protected class of provisions or rules otherwise neutral on their face, the burden shifts to the employer to establish "business necessity." Here, Western's business necessity evidence was the same as its evidence in support of its other defenses, including its evidence that its union contract barred plaintiffs' downbids, and the System Board's determination (A15, 39-43). The disparate impact theory has been uniformly recognized as applicable to ADEA cases. *Akins v. South Central Bell Telephone Co.*, 744 F.2d 1133, 1136 & n.4 (5th Cir. 1984); *Massarsky v. General Motors Corp.*, 706 F.2d 111, 117 (3d Cir.), *cert. denied*, 104 S. Ct. 343 (1983); *Geller v. Markham*, 635 F.2d 1027, 1032 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 690-91 (8th Cir. 1983); *EEOC v. Borden's, Inc.*, 724 F.2d 1390, 1394 (9th Cir. 1984); *Allison v. Western Union Telegraph Co.*, 680 F.2d 1318, 1322 (11th Cir. 1982); *Douglas v. Anderson*, 656 F.2d 528, 531 (9th Cir. 1981).

CONCLUSION

For the foregoing reasons, the Ninth Circuit's decision upholding the jury verdict and Judge Tashima's decision should be affirmed, and Western's writ of certiorari should be dismissed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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In the

Supreme Court of the United States

OCTOBER TERM, 1984

WESTERN AIR LINES, INC.,

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v.

CHARLES G. CRISWELL, ALBERT RON, and RULON H. STARLEY,

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WESTCOT B. STONE, III, et al.,

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL COUNCIL ON THE AGING, INC., THE VILLERS FOUNDATION, AND THE NATIONAL GRAY PANTHERS

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INDEX

PAGE

INTEREST OF THE AMICI CURIAE 1-2

SUMMARY OF ARGUMENT 2-3

ARGUMENT 4-30

I. INTRODUCTION 4

II. THE BONA FIDE OCCUPATIONAL QUALIFICATION EXCEPTION IS AN INTEGRAL COMPONENT OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT, AND ANY ATTEMPTS TO WEAKEN IT MUST BE REJECTED 5-13

A. The Petitioner Proposes a Gutting of the Bona Fide Occupational Qualification Exception 5-8

B. The Petitioner's Invocation of Public Safety is a Smokescreen Designed to Undercut the Proper Course, e.g., Individualized Treatment 9-12

C. If the Bona Fide Occupational Qualification Test is to be Altered, Modification Should be in the Direction of Making it More Restrictive of Employer Freedom 12-13

III. THE REASONABLE FACTORS OTHER THAN AGE EXCEPTION OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT CONSTITUTES AN AFFIRMATIVE DEFENSE 13-30

A. The Legislative History of the Reasonable Factors Other Than Age Exception Upholds Reading it as an Affirmative Defense 13-18

a. The Reasonable Factors Other Than Age Exception's Genesis 13-16

PAGE

b. Conclusions to be Drawn From the Legislative History 16-18

B. Case Law Regarding the Burden to be Shouldered by the Invoker of the Reasonable Factors Other Than Age Defense is Sparse, but in Part Instructive 18-25

a. Equal Pay Act Precedent is Dispositive 18-21

b. ADEA Case Law Reveals a Lack of Analysis 21-25

C. To Read the Reasonable Factors Other Than Age Exception as Less than an Affirmative Defense Would be to Gut it of Substantive Significance 25-30

a. The Inappropriateness of the Title VII Analogy 25-26

b. Alternatives to the Title VII Analogy —The Proper Reading of the Reasonable Factors Other Than Age Exception 26-30

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

A. H. Phillips, Inc. v. *Walling*, 342 U.S. 490 (1945) .. 20

Air Line Pilots Association, International v. *Trans World Airlines, Inc.*, 713 F.2d 940 (2d Cir. 1983), *cert. granted sub nom. Trans World Airlines, Inc.* v. *Thurston*, 104 S. Ct. 1412 (1984) 7,9

Albemarle Paper Co. v. *Moody*, 422 U.S. 405 (1975) 8

Arnold v. *Ben Kanowsky, Inc.*, 361 U.S. 388 (1960) 20

Bell v. *Birmingham Linen Service*, 715 F.2d 1552 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 2385 (1984) 24

PAGE

Bonner v. *City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) 21

Corning Glass Works v. *Brennan*, 417 U.S. 188 (1974) 19

Cova v. *Coca-Cola Bottling Co. of St. Louis*, 574 F.2d 958 (8th Cir. 1978) 22

Cowen v. *Standard Brands, Inc.*, 572 F. Supp. 1576 (N.D. Ala. 1983) 21,22

Criswell v. *Western Airlines, Inc.*, 709 F.2d 544 (9th Cir. 1983), *cert. granted*, 105 S. Ct. 80 (1984) 22,24,25,27

Dothard v. *Rawlinson*, 433 U.S. 321 (1977) 7

Equal Employment Opportunity Commission v. *City of Los Angeles*, 526 F. Supp. 1135 (C.D. Cal. 1981), *aff'd*, 706 F.2d 1039 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 984 (1984) 11

Equal Employment Opportunity Commission v. *City of New Castle*, 32 Fair Empl. Prac. Cas. (BNA) 1409 (W.D. Pa. 1983), *aff'd without opinion*, 34 Fair Empl. Prac. Cas. (BNA) 836 (3d Cir. 1984) .. 29

Equal Employment Opportunity Commission v. *City of St. Paul*, 671 F.2d 1162 (8th Cir. 1982) 8

Equal Employment Opportunity Commission v. *Commonwealth of Pennsylvania Liquor Control Board*, 565 F. Supp. 520 (E.D. Pa. 1983) 8

Equal Employment Opportunity Commission v. *County of Allegheny*, 519 F. Supp. 1328 (E.D. Pa. 1981), *aff'd*, 705 F.2d 679 (3d Cir. 1983) 21,29

Equal Employment Opportunity Commission v. *County of Santa Barbara*, 666 F.2d 373 (9th Cir. 1982) 7,8,23

Equal Employment Opportunity Commission v. *Home Insurance Co.*, 672 F.2d 252 (2d Cir. 1982) .. 18

PAGE

Equal Employment Opportunity Commission v. *Liggett & Meyers, Inc.*, 29 Fair Empl. Prac. Cas. (BNA) 1611 (E.D.N.C. 1982) 22

Equal Employment Opportunity Commission v. *University of Texas Health Science Center*, 710 F.2d 1091 (5th Cir. 1983) 6,11

Equal Employment Opportunity Commission v. *Westinghouse Electric Corp.*, 725 F.2d 211 (3d Cir.), *cert. denied*, 105 S. Ct. 92 (1984) 21,22

Equal Employment Opportunity Commission v. *Wyoming*, ... U.S. ....., 103 S. Ct. 1054 (1983) 29

Furnco Construction Corp. v. *Waters*, 438 U.S. 567 (1978) 24

Hagelthorn v. *Kennecott Corp.*, 710 F.2d 76 (2d Cir. 1983) 24

Heiar v. *Crawford County*, 35 Fair Empl. Prac. Cas. (BNA) 1458 (7th Cir. 1984) 6

Hodgson v. *First Federal Savings & Loan Association*, 455 F.2d 818 (5th Cir. 1972) 21

Hoefelman v. *Conservation Commission*, 718 F.2d 281 (8th Cir. 1983) 6,11

Jacobs v. *College of William and Mary*, 517 F. Supp. 791 (E.D. Va. 1980), *aff'd without opinion*, 661 F.2d 922 (4th Cir.), *cert. denied*, 454 U.S. 1033 (1981) 22

Lee v. *Russell County Board of Education*, 684 F.2d 769 (11th Cir. 1982) 24

Loeb v. *Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979) 7,21,24

Lorillard v. *Pons*, 434 U.S. 575 (1978) 7,20,27

Lorillard v. *Pons*, 434 U.S. 575 (1978) .....

Mahoney v. *Trabucco*, 738 F.2d 35 (1st Cir.), *cert. denied*, 105 S. Ct. ..... (1984) 8

PAGE

Marshall v. *Goodyear Tire & Rubber Co.*, 22 Fair Empl. Prac. Cas. (BNA) 775 (W.D. Tenn. 1979) .. 22,29

Marshall v. *Westinghouse Electric Corp.*, 576 F.2d 588 (5th Cir. 1978) 5,18,21,22,23,24

Mastie v. *Great Lakes Steel Corp.*, 424 F. Supp. 1299 (E.D. Mich. 1976) 22

McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) 24

Mitchell v. *Kentucky Finance Co.*, 359 U.S. 545 (1947) 20

Morgan v. *Goldschmidt*, 33 Fair Empl. Prac. Cas. (BNA) 797 (D.D.C. 1980) 22

Orzel v. *City of Wauwatosa Fire Department*, 697 F.2d 743 (7th Cir.), *cert. denied*, 104 S. Ct. 494 (1983) 7,8,11,23

Oscar Mayer & Co. v. *Evans*, 441 U.S. 750 (1979) 7

Popko v. *City of Clairton*, 570 F. Supp. 446 (W.D. Pa. 1983) 29

Schwager v. *Sun Oil Co.*, 591 F.2d 58 (10th Cir. 1979) 21,22

Smallwood v. *United Air Lines, Inc.*, 661 F.2d 303 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982) .. 7,8

Stewart v. *Smith*, 673 F.2d 485 (D.C. Cir. 1982) 8

Texas Department of Community Affairs v. *Burdine*, 450 U.S. 248 (1981) 26,27,28,30

Tuohy v. *Ford Motor Co.*, 675 F.2d 842 (6th Cir. 1982) 8

Udall v. *Tallman*, 380 U.S. 1 (1965) 25

Usery v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976) 7,8

Wirtz v. *Basic Incorporated*, 256 F. Supp. 786 (D. Nev. 1966) 19

Statutes

PAGE

Age Discrimination Act of 1975, as amended, 42 U.S.C. §§6101-6107 4

Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§621-634 ..... 2,4,5,6,7,8,9,11,12, 13,14,15,17,18,19,20,21,23,34,25,26,27,28,29,30

§4(f) 15,18

§4(f)(1), 29 U.S.C. §623(f)(1) 5,13,15,17,24

§4(f)(2), 29 U.S.C. §623(f)(2) 17,18

§4(f)(3), 29 U.S.C. §623(f)(3) 17,18

29 U.S.C. §626(c)(2) 7

Civil Rights Act of 1964, Title VII, 42 U.S.C. §§2000e - 2000e-17 7,14,19,24,26,27

Equal Credit Opportunity Act, 15 U.S.C. §§1691-1691f 4

Equal Employment Opportunity Act of 1972, P.L. 92-261, 86 Stat. 111 14

Equal Pay Act, 29 U.S.C. §206(d) 18,19,20,24,25,28

Fair Labor Standards Act, 29 U.S.C. §§201-219 14,19,20

Fair Labor Standards Amendments of 1966, P.L. 89-601, 70 Stat. 845 14

P.L. 88-352, 78 Stat. 265 14

Regulations

29 C.F.R. §1625.6(b) (1984) 6,8,13

29 C.F.R. §1625.7(c) (1984) 29

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Legislative History

PAGE

Age Discrimination in Employment, Hearings Before the General Subcommittee on Labor, Committee on Education and Labor, U.S. House of Representatives, 90th Cong., 1st Sess. (1967) 16

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PAGE

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IN THE

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BRIEF AMICUS CURIAE OF THE NATIONAL COUNCIL ON THE AGING, INC., THE VILLERS FOUNDATION, AND THE NATIONAL GRAY PANTHERS

INTEREST OF THE AMICI CURIAE*

The National Council on the Aging, Inc., is a national organization composed of a varied membership united

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* The parties have consented to the filing of this brief.

by a commitment to the principle that the nation's older people are entitled to lives of dignity, security, physical, mental and social well-being, and to full participation in society. NCOA conducts research and demonstration projects, provides training and technical assistance, develops program standards, and disseminates information.

The Villers Foundation is a private, non-profit foundation created in 1982 with its principal goal being the nurturing of change in American society to eliminate stereotypical views of the proper role of older persons. The Foundation seeks, through a variety of activities, to break down barriers which prevent elders from making contributions to society in paid and volunteer work settings.

The National Gray Panthers is a 60,000-member national organization whose membership is composed of both young and old persons, and which seeks to reform and improve institutions and laws which affect the lives of older people. A particular focus of the organization is age discrimination.

SUMMARY OF ARGUMENT

The Age Discrimination in Employment Act (ADEA) constitutes the primary federal protector of older workers' rights. Accordingly, the lower courts uniformly have recognized that the Act's exceptions are to be narrowly construed. Here, the petitioner proposes an unwise and unwarranted expansion of the ADEA's bona fide occupational qualification (BFOQ) exception. The petitioner contends, notwithstanding that the BFOQ is an affirmative defense, that the Court should drastically minimize the burden borne by the employer in justifying what would otherwise undeniably be unlawful age discrimination. This assault on the BFOQ defense is meritless.

If anything, the BFOQ exception already affords too great freedom to employers to discriminate. It does so because the BFOQ provision, as interpreted, cuts against the proper way to deal with workers—e.g., on an individualized basis whereby each person's particular abilities and competencies are addressed, as opposed to simplistic reliance on the uninformative fact of the person's age. Clearly, then, the BFOQ defense does not merit expansion; rather, contraction is in order. Nor does the rhetoric of the petitioner regarding safety issues necessitating greater freedom to discriminate change the correctness of this conclusion. The ADEA BFOQ already allows ample room for safety concerns to be considered by judges and juries.

The ADEA's reasonable factors other than age (RFOA) exception constitutes, contrary to the petitioner's argument, an affirmative defense. Both legislative history and analogical case law support this conclusion. So, too, does a common sense reading of the RFOA exception, given its placement contiguous to the BFOQ defense. The case law which supports a contrary conclusion is both sparse and, more importantly, devoid of analytical persuasiveness.

In reading the RFOA exception as an affirmative defense, it is appropriate to recognize that it is to be invoked in situations where an employer overtly utilizes an age distinction, or where it utilizes a practice or policy affecting more than one worker. In individual claims of discrimination, it is appropriate to recognize that the employer—in accordance with the case law—can invoke, in a generic sense, a reasonable justification for its action and thereby satisfy its burden in such a case, e.g., articulation of a legitimate, non-discriminatory reason for its action.

ARGUMENT

I. INTRODUCTION

Distinctions based on age are ubiquitous; age commonly is used as a basis for allocating rights, responsibilities, benefits, and detriments. *See generally* Eglit, *Of Age and the Constitution*, 57 Chi. Kent L. Rev. 859 (1981). Too often, the use of age as a basis for making distinctions leads to unfair treatment. It is this unfairness which was the driving force leading to enactment of the Age Discrimination in Employment Act, as amended (ADEA), 29 U.S.C. §§621-634. And it is this unfairness—still all too prevalent in the workplace today—which is the continuing pernicious vice which makes the ADEA so important, standing as it does as the only substantively meaningful federal effort to cabin and control ageism.[1] It is with this appreciation of the significance of the ADEA that the Court should approach the petitioner's arguments in this case, for the petitioner proposes no less than to significantly diminish the protections which the ADEA extends to victims of age discrimination.

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[1] While there are a few other federal statutes dealing with age discrimination, such as the Age Discrimination Act of 1975, as amended, 42 U.S.C. §§ 6101-6107, and the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f, most of them do not address discrimination in employment. Moreover, save for the ADEA, most of these statutes are of little substantive force. *See generally* Eglit, Age Discrimination, Volumes I and 2 (1984); Eglit, *The Age Discrimination Act of 1975, as Amended: Genesis and Selected Problem Areas*, 57 Chi. Kent L. Rev. 915 (1981).

II. THE BONA FIDE OCCUPATIONAL QUALIFICATION IS AN INTEGRAL COMPONENT OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT, AND ANY ATTEMPTS TO WEAKEN IT MUST BE REJECTED.

A. The Petitioner Proposes a Gutting of the Bona Fide Occupational Qualification Exception.

The petitioner, and most of the amici supporting it, would have this Court believe that the bona fide occupational qualification (BFOQ) exception contained in §4(f)(1), 29 U.S.C. §623(*f*)(1), of the ADEA is a difficult-to-apply provision which unduly restricts employers by allowing judges and juries to inappropriately second-guess what should be inviolate decisions made by airlines in the name of public safety. Accordingly, the petitioner espouses a drastic expansion of the BFOQ defense, opening the door for the proverbial swallowing of the rule — e.g., non-discrimination, by the exception. Such an expansion of course would be no less than approval of unbridled discrimination by employers, for it is clear that when a defendant invokes the BFOQ affirmative defense, it indeed is admitting discrimination. The defense is simply designed to relieve the wrongdoer of liability for that discrimination. *Marshall* v. *Westinghouse Electric Corp.*, 576 F.2d 588, 591 (5th Cir. 1978).

What the petitioner seeks is a new BFOQ test which would remove judges and juries from any meaningful role in assessing the merits of a BFOQ defense invoked in the name of public safety by an airline, this to be accomplished by easing the defendant's burden. (Of course, public safety issues are not confined to air travel; thus, any expansion of the BFOQ defense to afford greater freedom to employers to discriminate inevitably would be felt in a variety of settings.) In the view of the peti-

tioner "[c]ommercial airlines must be afforded flexibility and discretion. . . ." Pet. Br., at 12. "[J]uries simply do not possess the skill or experience to promulgate flight safety rules. . . ." *Ibid.* "[T]he airlines are simply better equipped than courts or juries to deal with issues concerning the safety of their passengers." *Id.* at 35. From these perceptions it follows, according to the petitioner, that it should only bear a burden of demonstrating — as opposed to proving—a factual basis for its belief that individual evaluations will not, as a practical matter, identify those who are unqualified to serve as flight engineers. *Id.* at 25, 28. Moreover, particular deference should be accorded to employers which invoke public safety as the purported basis for the discrimination they perpetrate. *Id.* at 28-29.

Petitioner certainly offers no small plans. Indeed, its 'new and better' BFOQ exception would fly in the face of the impressive consenses which the courts have expressed through a considerable body of decisions. There is, for one, uniform recognition of the BFOQ exception as an affirmative defense, resulting in the burden of proof being on its invoker.[5] While not repudiating this characterization of the BFOQ, petitioner's solution in effect mocks it by so diluting the integral burden aspect of the defense.

Second, it is also generally agreed that the ADEA is remedial and humanitarian legislation and that, accord-

[5] *See*, e.g., Heiar v. Crawford County, 35 Fair Empl. Prac. Cas. (BNA) 1458, 1462, 1463 (7th Cir. 1984); Hoefelman v. Conservation Commn., 718 F.2d 281, 283 (8th Cir. 1983); Equal Employment Opportunity Commn. v. University of Texas Health Science Center, 710 F.2d 1091, 1093 (5th Cir. 1983). The ADEA enforcement agency—the Equal Employment Opportunity Commission —is in accord. 29 C.F.R. §1625.6(b) (1984).

ingly, exceptions to it—most particularly the BFOQ provision—are to be narrowly and strictly construed.[6] This appreciation of the ADEA BFOQ of course parallels the like assessment made by this Court of the analogous BFOQ contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e - §2000e-17. *Dothard* v. *Rawlinson*, 433 U.S. 321, 334 (1977).[7] The petitioner's approach of course entails an exception of expansive scope.

Third, there likewise today is uniform recognition of the fact that jury trials are guaranteed in private ADEA suits—a guarantee first confirmed by this Court in *Lorillard* v. *Pons*, 434 U.S. 575 (1978). This guarantee of course extends to cases in which the BFOQ defense is invoked, both by virtue of the *Lorillard* holding and by virtue of the post-*Lorillard* amending of the ADEA to statutorily erect a right to jury trials. 29 U.S.C. §626 (c)(2). *See generally* 2 Eglit, Age Discrimination §17.31 (1984). Petitioner expresses a profound distrust of juries, and seeks to diminish their role to de minimis status.

[6] *See, e.g.*, Oscar Mayer & Co. v. Evans, 441 U.S. 750, 765 (1979)(Blackmun, J., concurring); Air Line Pilots Ass'n, Internat'l v. Trans World Airlines, Inc., 713 F.2d 940, 951 (2d Cir. 1983), *cert. granted sub nom.* Trans World Airlines, Inc. v. Thurston, 104 S. Ct. 1412 (1984); Orzel v. City of Wauwatosa Fire Dept., 697 F.2d 743, 748 (7th Cir.), *cert. denied*, 104 S.Ct. 494 (1983); Equal Employment Opportunity Commn. v. County of Santa Barbara, 666 F.2d 373, 376 (9th Cir. 1982); Smallwood v. United Air Lines, Inc., 661 F.2d 303, 307 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982); Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 230 (5th Cir. 1976).

[7] In Lorillard v. Pons, 434 U.S. 575 (1978), the Court observed that the prohibitions of the ADEA were derived "*in haec verba*" from Title VII. *Id.* at 584. Understandably, ADEA courts regularly look to Title VII case law for guidance. *See, e.g.*, Oscar Mayer & Co. v. Evans, 441 U.S. 750, 755-58 (1979); Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979).

Finally, virtually all the courts of appeals have embraced the same two-part test for construing the demands of the BFOQ defense. This test, first articulated in *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976), imposes upon the employer the burden of establishing (1) that the age limit it utilizes is reasonably necessary to the essence of its business, and (2) either (a) that it has reasonable cause, i.e., a factual basis, for believing either that all or substantially all individuals within the excluded group are unable to perform their job duties safely and efficiently or (b) that it is impossible or impractical to determine the disqualifying trait on an individual basis.[8] Petitioner deems this test too restrictive, and proposes its modification.

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[8] *See, e.g.*, Mahoney v. Trabucco, 738 F.2d 35 (1st Cir.), *cert. denied*, 105 S.Ct. ..... (1984); Orzel v. City of Wauwatosa Fire Dept., 697 F.2d 743 (7th Cir.), *cert. denied*, 104 S.Ct. 494 (1984); Tuohy v. Ford Motor Co., 675 F.2d 842 (6th Cir. 1982); Stewart v. Smith, 673 F.2d 485, 491 n.26 (D.C. Cir. 1982); Equal Employment Opportunity Commn. v. City of St. Paul, 671 F.2d 1162 (8th Cir. 1982); Equal Employment Opportunity Commn. v. County of Santa Barbara, 666 F.2d 373 (9th Cir. 1982); Smallwood v. United Air Lines, Inc., 661 F.2d 303 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982).

The EEOC prescribes a like test, but adds a further element making the employer's task even tougher in public safety cases. "If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact." 29 C.F.R. §1625.6(b) (1984). *Accord* Equal Employment Opportunity Commn. v. Commonwealth of Pa. Liquor Control Bd., 565 F.Supp. 520 (E.D. Pa. 1983). Agency interpretations are deserving of very considerable deference by the courts. Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975).

B. The Petitioner's Invocation of Public Safety Is a Smokescreen Designed to Undercut the Proper Course, e.g., Individualized Treatment

The petitioner seeks to make its assault on the ADEA palatable by wrapping itself in the mantle of public safety rhetoric. Obviously, the safety ploy failed in this case. The jury was not persuaded that allowing men and women 60 and over to serve as flight engineers would lead to disaster. In part, petitioners argue, this conclusion was reached because juries simply are incompetent to make such judgments. In part, the jury erred because, it is argued, they were not instructed properly. Of course, given the petitioner's view of jury competence, apparently even an instruction which had in every word and phrase hewed exactly to the two-part *Tamiami* formula (and, for all practical and legally significant purposes the instruction did so) would still have been unduly restrictive, since it still would have left room for the jury to decide the merits of the petitioner's claim.

In fact, of course, the jury instruction here was entirely in accord with the well-established two-part test embraced both in the Ninth and other Circuits. In fact, also, there is nothing to indicate that the jury's conclusion was not supported by the evidence. Certainly, moreover, the verdict was in accord with the conclusion reached, lo and behold, by a major air carrier—Trans World Airlines, which since 1978 has employed flight engineers ages 60 and over. *See Air Line Pilots Association, International* v. *Trans World Airlines, Inc.*, 713 F.2d 940 (2d Cir. 1983), *cert. granted sub nom. Trans World Airlines, Inc.* v. *Thurston*, 104 S.Ct. 1412 (1984).

These observations aside, there is an even more fundamental reason for finding the petitioner's arguments wanting. What the petitioner espouses is carte blanche for

airlines (and, by reasonable extension, any employer engaged in an activity involving public safety) to rely upon unverified generalizations about the aging process, whereby employees will not be treated as individuals, but rather simply as members of age groups, with their membership determinative of their treatment no matter their individual qualifications and competencies. This posture flies in the face of all the best-informed thinking regarding aging and the aging process.

Aging is an individualized process which cuts against the accuracy (as well as the fairness) of generalizations.[6] There are more individual variations within a given age group than there are between age groups.[7] Of course changes occur as we age, but these changes vary greatly among individuals as to the particular age at which they occur. Similarly, the degree to which these changes affect

[6] *See generally* Birren & Loucks, *Age Related Changes and the Individual,* 57 Chi. Kent L. Rev. 833 (1983); Kelleher & Quirk, *Age, Physical Capacity and Work; An Annotated Bibliography,* Indus. Gerontology 80 (Fall. 1983); Drucker & Moore, *Mandatory Retirement: Past, Present and Future of an Anachronism,* 5 W.St.U.L. Rev. 1, 5-6 (1977); Note, *Age Discrimination in Employment,* 50 N.Y.U.L. Rev. 924, 935-36 (1975); Note, *Age Discrimination in Employment: The Problem of the Older Worker,* 41 N.Y.U.L. Rev. 383, 396-99 (1966); Note, *The Constitutional Challenge to Mandatory Retirement Statutes,* 49 St. John's L. Rev. 748, 773 - 77 (1975).

[7] *See generally* Kutscher & Walker, *Comparative Job Performance of Office Workers by Age,* 83 Monthly Lab. Rev. 39 (1961). Moreover, "there is no objective evidence to support any generalized relationship between age and ability as measured by productivity." National Council on the Aging, Utilization of Older Professional and Scientific Workers 9 (1961). *See also Improving the Age Discrimination Law,* A Working Paper of the Senate Special Comm. on Aging, 93rd Cong., 1st Sess. 15 (1973).

individuals varies, as do the individuals' abilities to compensate for them.[8] In sum, generalizations by their very nature do unwarranted violence to those to whom they are attached.

Perhaps, if judges and juries were unable to comprehend the medical, psychological, sociological and other data which may be relevant in a given ADEA case, one might conclude that generalizing—while unfair—is unfortunately necessary. The fact, of course, is that an impressive body of case law establishes that the judicial system is fully capable of addressing such data in a respectable and responsible manner.[9] What is more, the fact is that the drafters of the ADEA—and the courts which have construed it—indeed have left room both for taking cognizance of safety concerns, and for allowing reliance upon the very type of generalizations which the petitioner espouses (albeit not persuasively enough to prevail in this case).

The standard BFOQ formula allows safety to be taken into account under the first prong of the test—e.g., the determination of what the essence of the employer's business is. And the second part of the test explicitly invokes safety by allowing the employer to prevail where it can prove that there is a factual basis for believing that all, or just substantially all, of the members of the excluded group cannot perform safely. (This, by the way, is a

[8] *See generally* Birren & Loucks, *op cit.* note 6.

[9] *See, e.g.,* Equal Employment Opportunity Commn. v. University of Texas Health Science Center, *op cit.* note 2; Orzel v. City of Wauwatosa Fire Dept., *op cit.* note 3; Hoefelman v. Conservation Commn., *op cit.* note 2; Equal Employment Opportunity Commn. v. City of Los Angeles, 526 F.Supp. 1135 (C.D. Cal. 1981), *aff'd.,* 706 F.2d 1039 (9th Cir. 1983), *cert. denied,* 104 S.Ct. 984 (1984).

comparatively easy standard to satisfy, and it was this standard which was applied in this case, rather than the imaginary "to a certainty" standard which the petitioner wrongly contends was imposed on it. Pet. Br., at 42.) By allowing an employer to prevail just by proving that there is a factual basis for believing (rather than '*the* factual basis for establishing with certainty') that members of the excluded group cannot perform, the BFOQ test indeed enables employers to engage in generalizing, rather than individualized treatment.

In sum, the existing BFOQ test is already solicitous of employers. It already cuts against the optimal approach to eradicating age discrimination—e.g., individualized assessment of employee's abilities and performances. The BFOQ exception, then, hardly merits (and perhaps could not survive) further dilution.

C. If the Bona Fide Occupational Qualification Test is to be Altered, Modification Should be in the Direction of Making it More Restrictive of Employer Freedom

The petitioner and its supporting amici are in effect inviting the Court to supplant the present two-part test utilized in applying the ADEA BFOQ with a more relaxed standard, allowing greater discretion to employers. Actually, the presently popular BFOQ test is a mild one which affords too little protection to victims of age discrimination. Thus, if indeed the Court is of a mind to engage in legal surgery, it ought to invigorate the BFOQ exception by trimming the present employer-protective formulation.

The employer should be held to the standard that in fact the petitioner wrongly accuses the lower courts in this case of having espoused. In other words, a more protective standard—e.g., a standard vigorously reflective of the ADEA's goal of eradicating age discrimination—would impose upon the employer the burden of proving *to a certainty* that indeed all or substantially all members of the excluded group are unable to perform safely and efficiently, or *to a certainty* that it is impossible to utilize individualized treatment. It would also be appropriate—given the humanitarian and remedial nature of the ADEA, and particularly given the fact that invocations of "safety" are more likely to stampede judges and juries into acquiescing to the employer's position than they are to leave the fact-finders unimpressed—to embrace the least restrictive alternative standard adopted by the Equal Employment Opportunity Commission. *See* 29 C.F.R. §1625.6(b) (1984).[10]

III. THE REASONABLE FACTORS OTHER THAN AGE EXCEPTION OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT CONSTITUTES AN AFFIRMATIVE DEFENSE

A. The Legislative History of the Reasonable Factors Other Than Age Exception Upholds Reading it as an Affirmative Defense

a. The Reasonable Factors Other Than Age Exception's Genesis

There is no question that the reasonable factors other than age (RFOA) exception contained in §4(f)(1), 29 U.S.C. §623(f)(1), of the ADEA has a fairly unilluminating history. Nonetheless, what data there are—and there are some—are persuasive in confirming that the RFOA exception is an affirmative defense. Thus, the Court of Appeals for the Ninth Circuit was correct in its characterization of this provision.

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[10] This provision is quoted in full in note 5.

Prior to enactment of the ADEA in 1967, efforts had been made to erect a federal scheme outlawing, or at least limiting, age discrimination in employment. An effort to amend the bill ultimately enacted as Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e - 2000e-17, had failed.[11] Likewise, an effort in 1966 to amend the Fair Labor Standards Act (FLSA), 29 U.S.C. §§201-219, was unsuccessful.[12]

In January, 1967, President Johnson sent to the Congress his recommendations, which later that year were enacted—in somewhat modified form— as the ADEA. The Administration bill contained a subsection in which were joined—in the same language as is codified today—the BFOQ and RFOA exceptions.

The hearings on the ADEA legislation virtually ignored the RFOA exception, as did the Floor debates, as well. Secretary of Wirtz made fleeting, but uninformative reference, to the provision during the course of the Senate

[11] 110 Cong. Rec. 2596-99, 9611-13, 13490-92 (1964). The 1964 Act did direct the Secretary of Labor to make a study of the problem of age discrimination in employment. P.L. 88-352, 78 Stat. 265, §715 (1964) (since superseded by §10 of the Equal Employment Opportunity Act of 1972, P.L. 92-261, 86 Stat. 111). That study was issued in June, 1965, and was entitled *The Older American Worker: Age Discrimination in Employment.*

[12] An amendment was accepted in the Senate, but ultimately it was rejected by the House and Senate conferees convened to address the 1966 bill. Rather, a provision was enacted directing the Secretary of Labor to submit specific legislative recommendations for implementing the conclusions and recommendations contained in his 1965 study, noted in note 11. Fair Labor Standards Amendments of 1966, P.L. 89-601, 70 Stat. 845, §606.

hearings.[13] The House hearings afforded no more guidance.[14] The ensuing committee reports and debates on the ADEA bills maintained the same opacity regarding the RFOA defense. While the committee reports noted the

[13] Secretary Wirtz asserted, in his prepared statement before the Senate, that it was only "*arbitrary*" age discrimination which the legislation aimed to eradicate. Age Discrimination in Employment, Hearings Before the Subcommittee on Labor, Committee on Labor and Public Welfare, U.S. Senate, 90th Cong., 1st Sess. 39 (1967). He followed this with recitation of the §4(f) defenses, and with the ensuing statement that these defenses were "obviously broad."

The sole other attention directed during the course of the Senate hearings to the RFOA provision consisted of further commentary by Secretary Wirtz. He was asked by Senator Randolph to offer his view as to the refusal by an airline to train a 45-year-old man to be a pilot, given the facts that a Federal Aviation Administration regulation required retirement at age 60, that the training period would be three years, and that the training would be very expensive. Responding in an admittedly tentative manner, Secretary Wirtz first quoted §4(f)(1), which of course contained--then and now—both the ADEA's BFOQ and RFOA defenses. Without identifying the one or the other defense as the source of his insights, Secretary Wirtz went on to state:

> I would think that where there is that much training requirement, that that would be a legitimate factor; that you would weigh the period of the usefulness of that person against the period of the training that was required, taking full account of the cost factors and human factors . .
>
> I would not think it would be a violation of the provision to deny employment on those terms.

Id. at 49.

[14] The closest to a direct discussion concerning the RFOA exception occurred during the course of a dialogue between Representative Burton and Secretary Wirtz. The Congressman asked whether the provisions of the legislation would override a collective bargaining agreement

existence of the RFOA provision, they did not explain it. The sole effort at substantive elucidation was that made by Senator Yarborough, chairman of the Senate committee and Senate manager of the legislation. He stated:

> The bill provides for four exceptions from the enforcement provision:
>
> . . .
>
> Second. Where differentiation is based on reasonable factors other than age. For example, if a test shows that a man cannot do certain things. He might fail to pass the test at 35; he might fail to pass the test at 55. Some men slow up sooner than others. If the job requires a certain speed and the differentiation is based upon factors other than age, the law would not apply.

113 Cong. Rec. 31253 (Nov. 6, 1967).

b. Conclusions to be Drawn From the Legislative History

Review of the RFOA's legislative history makes one thing very clear. Neither the genesis nor the formative

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[14] (Continued)
with reference to seniority. The following colloquy then occurred:

> Secretary Wirtz . . . . If a seniority clause were so constructed or a retirement clause were so constructed that it unfairly attached significance to age, my answer would be "Yes" to your question.
> Mr. Burton. Who would judge that?
> Secretary Wirtz. The Secretary of Labor.
> Mr. Burton. By what standards?
> Secretary Wirtz. By the standards of whether there is differentiation on the basis of age which the facts do not warrant.

Age Discrimination in Employment, Hearings before the General Subcommittee on Labor, Committee on Education and Labor, U.S. House of Representatives, 90th Cong., 1st Sess. 14 (1967).

stages of the ADEA disclose any overly useful direct information regarding the RFOA provision. Even so, it would be very much wrong to conclude that the Act's history affords no guidance whatsoever. Indeed, there are several conclusions properly to be drawn.

First, it seems clear that the RFOA provision was in no way deemed to be in some manner distinctive from, or different than, the BFOQ exception with which it shares placement in §4(f)(1). Secretary Wirtz, representing the Administration's views as to the ADEA legislation—which of course was drafted by the Administration, treated the provisions as co-equal. All of them (and here he was including as well the exceptions embodied in §4(f)(2), 29 U.S.C. §623(f)(2)—which was subsequently modified, and in §4(f)(3), 29 U.S.C. §623(f)(3)) were "broad." *See* note 13, *supra*. Senator Yarborough referred to these provisions *in pari materia*, describing them as the "four exceptions."

Second, from the inception of the legislation the RFOA language has been situated contiguous to the BFOQ provision, which has consistently and without argument been recognized as an affirmative defense.[15] There is nothing in the history of the ADEA which justifies regarding this contiguity as being the product of hasty, last-minute draftsmanship, to which then could be attributed an inappropriate or unintended placement of the two provisions.

Third, there is nothing in the legislative history indicating that anyone envisioned the RFOA exception being in some manner different—insofar as burdens of proof

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[15] See Section II.A., *supra*.

are concerned—from the other exceptions contained in §4(f).[16]

In brief, while the legislative history hardly is strikingly revelatory, it clearly supports the conclusion that it is an uphill battle which must confront the party who would argue—as does the petitioner here—that the RFOA exception is to be read differently than the BFOQ in terms of burdens. Indeed, there is simply nothing in the legislative history to support that argument. On the other hand, what history there is—and the inferences properly to be drawn from it—support the contrary argument.

B. Case Law Regarding the Burden to be Shouldered by the Invoker of the Reasonable Factors Other Than Age Defense is Sparse, but in Part Instructive

a. Equal Pay Act Precedent is Dispositive

As the discussion of the legislative history discloses, the substance and operation of the RFOA provision did not—to understate the matter—dominate the attention either of the drafters or of the debaters of the ADEA. And yet, as it turns out, they did have guidance—guidance which, while imputed, is of particular legal significance.

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[16] As is the case regarding the BFOQ defense, it is well established that the §4(f)(2) exception constitutes an affirmative defense, with the burden of proof being on the defendant. See, e.g., *Equal Employment Opportunity Commn.* v. *Home Ins. Co.*, 672 F.2d 252, 257 (2d Cir. 1982). As for the good cause exception contained in §4(f)(3), there is very little case law. The leading case in support of not reading the RFOA provision as an affirmative defense—*Marshall* v. *Westinghouse Elec. Corp.*, 576 F.2d 588 (5th Cir. 1978), lumped this provision together with the RFOA exception in terms of burdens analysis. (*Marshall* is discussed in Subsection b. of Section II.B., *supra*.)

The ADEA is a hybrid—a mix of prohibitory language derived from Title VII of the Civil Rights Act of 1964 and of enforcement mechanisms derived from the FLSA. The prohibitions imposed by the ADEA do not exactly track those contained in Title VII, however, inasmuch as the age statute contains exceptions not included in the other statute. Title VII, for example, contains no analogue to the ADEA's RFOA defense. The Equal Pay Act (EPA), 29 U.S.C. § 206(d), does, however. And it is that analogue which is of special significance here.

Under the EPA wage differentials between the sexes for the performance of equal work are outlawed. There are four caveats to this prohibition, including one which provides:

> (d)(1) No employer . . . shall discriminate . . . except where such [differential] payment is made pursuant to . . . (iv) a differential based on any other factor other than sex.

In 1967, when Congress received, considered, modified, and eventually passed the legislation which was signed into law as the ADEA, it was clear that the EPA exceptions were affirmative defenses as to which the employer bore the burden of proof. The court in *Wirtz* v. *Basic Incorporated*, 256 F. Supp. 786 (D. Nev. 1966), had so held with regard to the EPA specifically.[17] *Id.* at 790. Moreover, the EPA is a part of the FLSA, and it was likewise clear in 1967 that it was the general rule "that the application of an exemption under the Fair Labor Standards Act is a matter of affirmative defense on which the employer has the burden of proof." *Corning*

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[17] This holding was since iterated by this Court in *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 196-97 (1974), and by numerous lower courts cited in the *Corning Glass* decision, *id.* at 196 n.11.

Glass Works v. *Brennan*, 417 U.S. 188, 196-97 (1974), citing *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 547-48 (1947); *A.H. Phillips, Inc.* v. *Walling*, 342 U.S. 490, 493 (1945).[19]

Given this construction of the FLSA generally, and of one of its component parts—the EPA—specifically, the observations of this Court in *Lorillard* v. *Pons*, 434 U.S. 575 (1978), in which the Court held that jury trials are available in private ADEA suits, are particularly apposite:

> Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change, ... So too, where . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretations given to the incorporated law, at least insofar as it affects the new statute.
>
> That presumption is particularly appropriate here since, in enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation. . . .
>
> This selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA.
>
> 434 U.S. at 580-82.

The conclusion to be drawn from this analysis would seem to be inescapable. Just as the EPA's "factor other

[19] 417 U.S. at 197 n.12.

than sex" exception imposes upon the defendant the burden of proof, so does the ADEA's "factors other than age" exception impose the same burden.

b. ADEA Case Law Reveals a Lack of Analysis

Four courts of appeals have ruled directly that the RFOA provision does not constitute an affirmative defense, with the result following therefrom that the employer which invokes the RFOA language only shoulders the comparatively easy burden of production, rather than the much more rigorous burden of persuasion.[20] *See Equal Employment Opportunity Commission* v. *Westinghouse Electric Corp.*, 725 F.2d 211, 222-23 (3d Cir.) *cert. denied*, 105 S.Ct. 92 (1984);[20] *Loeb* v. *Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979); *Schwager* v. *Sun Oil Co.*, 591 F.2d 58, 61 (10th Cir. 1979). *Marshall* v. *Westinghouse Electric Corp.*, 576 F.2d 588 (5th Cir. 1978).[21] A few

[20] While the Court of Appeals for the Eleventh Circuit has not addressed the issue, it should be grouped with the other four circuit courts which have, since the Court of Appeals for the Fifth Circuit has so construed the RFOA provision and Fifth Circuit law governs in the Eleventh Circuit until the appellate court for the latter circuit speaks on a given issue. *Bonner* v. *City of Prichard*, 661 F.2d 1206 (11th Cir. 1981). (Actually, a district court in the Eleventh Circuit nonetheless has ruled that the RFOA does constitute an affirmative defense. *Cowen* v. *Standard Brands, Inc.*, 572 F.Supp. 1576 (N.D. Ala. 1983)).

[20] *Accord Equal Employment Opportunity Comm.* v. *County of Allegheny*, 519 F.Supp. 1328 (W.D. Pa. 1981), *aff'd.*, 706 F.2d 679 (3d Cir. 1983).

[21] Several Fifth Circuit decisions both before and since *Marshall* have taken the same position, but it is only in the *Marshall* opinion that the court offered any analysis. One Fifth Circuit panel ruled to the contrary. *Hodgson* v. *First Fed. Sav. & Loan Assn.*, 455 F.2d 818 (5th Cir. 1972).

district courts outside these circuits are in accord."[21] Two Courts of Appeals subscribe to the proposition that the RFOA provision constitutes an affirmative defense, with the consequence being that the invoker of this defense bears the burden of persuasion."[22] Here, too, a handful of district courts are in accord."[23]

Neither position is particularly impressively supported by its proponents. The Third Circuit opinion in *Westinghouse Electric Corp.* is devoid of analysis. So, too, is the opinion of the Tenth Circuit court in *Schwager*. The courts in *Marshall* and *Loeb* did make some efforts at analysis, but they fall short.

The *Marshall* court contrasted the BFOQ and RFOA exceptions. The former clearly embodies an affirmative defense: "one in the nature of confession and avoidance." 576 F.2d at 591. The BFOQ defense is applicable, so the court reasoned, to general exclusionary rules whereby "otherwise statutorily protected individuals [may be excluded] solely on the basis of class member-

[21] *See Jacobs* v. *College of William & Mary*, 517 F.Supp. 791 (E.D. Va. 1980), *aff'd. without opinion*, 661 F.2d 922 (4th Cir.), *cert. denied*, 454 U.S. 1033 (1981); *Morgan* v. *Goldschmidt*, 33 Fair Empl. Prac. Cas. (BNA) 797 (D.D.C. 1980); *Mastie* v. *Great Lakes Steel Corp.*, 424 F.Supp. 1299 (E.D. Mich. 1976).

[22] *Criswell* v. *Western Airlines, Inc.*, 709 F.2d 544 (9th Cir. 1983), *cert. granted*, 105 S.Ct. 80 (1984); *Cova* v. *Coca-Cola Bottling Co. of St. Louis*, 574 F.2d 958, 959-60 (8th Cir. 1978). Admittedly, *Cova* is a less than crystal-clear treatment of the issue.

[23] *Cowen* v. *Standard Brands, Inc.*, 572 F.Supp. 1576 (N.D. Ala. 1983); *Equal Employment Opportunity Commn.* v. *Liggett & Meyers, Inc.*, 29 Fair Empl. Prac. Cas. (BNA) 1611, 1643 (E.D.N.C. 1982) (dictum); *Marshall* v. *Goodyear Tire & Rubber Co.*, 22 Fair Empl. Prac. Cas. (BNA) 775, 778 (W.D. Tenn. 1979).

ship." *Id.* In what the court stated—without explanation—was the contrasting situation, "[t]he good cause and differentiating factor exceptions . . . are denials of the plaintiff's prima facie case." *Id.* By way of further ostensible elucidation the court continued:

> Plaintiff says that the employer fired him because of his age; employer replies, in effect, not so, plaintiff was fired for excessive absences, general inability, or some other nondiscriminatory reason. [Footnote omitted]. The natural tendency of the court to place the burden of proof upon the party desiring change and the special policy considerations disfavoring the statutory exceptions both justify the distinction between these defenses.
>
> *Id.* at 591.

Even on its own terms, this analysis by the *Marshall* court is plainly misconceived. For, while the court was of the view that the RFOA provision does not come into play save with regard to individual cases, whereas it is the BFOQ defense which applies in instances of general rules,[25] in fact in the case now before this court the RFOA was invoked vis-a-vis a general rule. In any event, the *Marshall* court's analytical insights were, to be charitable, rather puny. For it has been observed repeatedly that civil rights statutes—and more particularly, the ADEA—are to be liberally construed and exceptions to them are to be narrowly applied. *See, e.g., Orzel* v. *City of Wauwatosa Fire Department*, 697 F.2d 743 (7th Cir.), *cert. denied*, 104 S.Ct. 494 (1984); *Equal Employment Opportunity Commission* v. *County of Santa*

[25] Indeed, in the same vein the *Marshall* court deemed the distinction justified because "the establishment of a BFOQ necessarily has an effect beyond the case being litigated since it permits an employer to deal with an entire class of citizens on an age-related basis . . .". 576 F.2d at 591 n.3.

Barbara, 666 F.2d 373, 376 (9th Cir. 1982). These canons debunk the court's cryptic rhetoric regarding the "natural tendency" of courts and regarding "disfavoring" of exceptions.

In *Loeb* v. *Textron, Inc.* the court reasoned that the similarities between Title VII and the ADEA warranted reading Title VII analysis into the ADEA, and that under Title VII the defendant in a discriminatory treatment case only bears a burden of production. To the crucial point that the presence of exceptions in the ADEA, and their absence in Title VII, bars an uncritical Title VII-ADEA equation, the court offered only a cryptic, opaque rebuttal. 600 F.2d at 1016.

Neither the *Marshall* nor *Loeb* courts addressed the legislative history or the Equal Pay Act's "reasonable factor other than sex" exception. Neither offered any explanation as to why—if indeed the RFOA provision is not to be read as an affirmative defense, the RFOA language is placed contiguous to what is undeniably an affirmative defense, e.g., the BFOQ exception. Neither addressed situations involving direct proof of discrimination (as here), where it would certainly be inappropriate to simply place on the defendant just a burden of production.[26] Ultimately, neither court could justify its position by anything more than saying "it's so because we say it's so.'

The *Criswell* court, though also short on analytical exigesis, at least reached the correct conclusion. The court correctly took its cue from the fact that "[t]he 'reasonable factors' defense appears alongside [sic] the BFOQ

[26] *See, e.g., Bell v. Birmingham Linen Service,* 715 F.2d 1552 (11th Cir. 1983), *cert. denied,* 104 S.Ct. 2385 (1984); *Hagelthorn* v. *Kennecott Corp.,* 710 F.2d 76 (2d Cir. 1983); *Lee* v. *Russell County Bd. of Educ.,* 684 F.2d 769 (11th Cir. 1982).

exception . . .". 709 F.2d at 552. It further correctly cited to the position taken consistently by the ADEA enforcement agencies that the burden of proof is on the defendant.[27] And the *Criswell* court further noted the deference due agency interpretations, *id.* at 553, citing *Udall* v. *Tallman,* 380 U.S. 1, 4-18 (1965).

C. To Read the Reasonable Factors Other Than Age Exception as Less Than an Affirmative Defense Would be to Gut it of Substantive Significance

a. The Inappropriateness of the Title VII Analogy

The petitioners would have this Court read the RFOA exception in the ADEA as imposing nothing more upon the invoker of the exception than a Title VII-derived burden of production. That position of course ignores the legislative history, as well as the analogical guidance of the Equal Pay Act. But, putting these factors aside, there is a perhaps even more compelling basis for rejecting the petitioners' position: it is a prescription for effectively reading the RFOA exception out of the Act. For to endorse the petitioner's construction, the Court would have to impose the gravest of insults upon the national legislature: to wit, it would in effect have to state that the Congress was engaged in a dullard's exercise whereby it adopted statutory language which is devoid of substan-

[27] It is true that the EEOC does not in all respects maintain that the burden of persuasion is to be borne by the defendant which puts forth some reasonable factor other than age as the basis for its action or decision. In cases involving individual claims of discriminatory treatment, the employer bears the arguably lesser burden of "showing that the 'reasonable factor other than age' exists factually." 29 C.F.R. §1625.7(f) (1984). This posture is entirely sensible, as discussed in Subsection b. of Section III.C., *infra.*

tive significance. This is because Title VII case law has been imported into the ADEA, and that Title VII case law—most particularly, *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981)—establishes that the defendant in a circumstantial discriminatory treatment case can satisfy its burden, once a prima facie case is made out, by articulating a legitimate non-discriminatory reason for its action. *Id.* at 254. Thus, in the common ADEA case, the defendant presumably can satisfy its burden—an easy one of production, rather than persuasion—simply by articulating what is in effect a generic 'reasonable factor other than age,' such as the plaintiff's lack of capability, or the plaintiff's inferior qualifications, or the absence of a job opening.[25]

If, indeed, the RFOA exception in the ADEA means no more than that which the *Burdine* Court established as the legal requirement imposed upon Title VII defendants in circumstantial discriminatory treatment cases, it follows that the RFOA provision is at best simply a redundancy. It accomplishes no more than this Court's decision—embraced by lower courts in ADEA actions—already imposes in any event.

b. Alternatives to the Title VII Analogy—The Proper Reading of the Reasonable Factors Other Than Age Exception

An unrefined construction of the RFOA as an affirmative defense may be insufficient. This is because, unless the Court identifies those situations in which the RFOA applies, the defense may have no practical utility. This conclusion follows because any half-way intelligent defendant, realizing that it can far more readily satisfy the *Burdine*-

[25] *See generally* 2 Eglit, Age Discrimination §17.66 (1984).

derived burden of production than the now-vindicated RFOA's burden of persuasion, will be loathe to invoke the RFOA defense. And so long as the ADEA defendant can rebut the prima facie case simply by articulating a legitimate, non-discriminatory reason for its action, there seemingly would be no reason for a defendant to even have to consider relying upon that defense.

At least two solutions are available. The first is to repudiate the application of *Burdine* to the ADEA. The Court, after all, has never endorsed the applicability of *Burdine* to the age statute, and so the issue remains an open one for it. More than that, legitimate arguments support limiting *Burdine's* reach. That decision was devised in the context of construing Title VII. While it is true that the "prohibitions of the ADEA were derived *in haec verba* from Title VII," *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978), it is also true—and more accurate—to point out that the ADEA's prohibitions are curtailed and modified by exceptions—one of which is the RFOA defense—which are not included in Title VII.

Granted, there is a possible response to this reasoning: at the time the Congress adopted the ADEA, *Burdine* was far off in the indecipherable future. Thus, it could be argued that Congress simply wanted to do by way of statutory language what was ultimately accomplished, after a number of years, by the courts by way of their looking to *Burdine* for guidance. Under this train of reasoning, the ultimate equation of the RFOA provision with the *Burdine*-derived burden comports with, rather than belies, Congressional intent. The trouble with this argument is that it simply does not gibe with (1) the fact that the RFOA is placed contiguous to the BFOQ exception, which is universally recognized as embodying an affirmative defense, and (2) the imputed knowledge which Con-

gress had of the Equal Pay Act, both establishing that Congress almost certainly understood the words "reasonable factors other than age" as constituting expression of an affirmative defense.

There is another option comprehendible within the contours of the ADEA, which both allows for the proper recognition of the RFOA affirmative defense, and does not debunk the ADEA case law which embraces *Burdine*. That is a reading of the RFOA exception as a variable provision, to be read as an affirmative defense in some settings, and as an expression of the *Burdine* concept in others. This reading requires, as a predicate, a brief return to the genesis of the ADEA. It is very important to recall what it was that Congress perceived as the evil needful of legislative remediation. The Secretary of Labor's 1965 report, *see* note 11, the hearings, the experts all had joined in one conclusion: arbitrary reliance upon age is bad; but not all reliance upon age is arbitrary.

It is when an employer possibly is relying upon outmoded notions about the incapacities of older people, or upon outmoded myths about older workers not being able to do a decent day's work, that the ADEA's protections are most urgently needed. Here, the risks of arbitrariness are at their greatest. In such circumstances, the RFOA should give the least possible leeway to employer abuse, and so it should be read as an affirmative defense, imposing the tough burden of persuasion upon the employer. In less outrageous situations, however, a more relaxed understanding of the defendant's burden is appropriate.

How may the varying situations be identified? First, when an employer avowedly maintains a policy which embodies an age distinction, the employer should not be able to justify use of such a suspect criterion simply by articulating a legitimate, non-discriminatory reason for

the policy. (This of course, is exactly the situation involved in *Criswell*, where the petitioner airline maintained a policy which openly excluded pilots who reached age 60 from qualifying as flight engineers.)[29] Second, rigorous application of the RFOA provision should apply whenever an employer utilizes a policy which, even if not explicitly reliant upon age, has age-related consequences which affect more than one worker. This is because the utilization of a policy (whether formal or informal) by definition means that the employer has arrived at some generalization about older workers as a group, and this type of thinking carries with it all the potentials for abuse characteristic of stereotypical treatment of people in group, as opposed to individual, terms. This is not to say that all age-neutral policies with age-related consequences run afoul of the ADEA.[30] But, given the Congress' well justified apprehension regarding the ageism embodied in thoughtless canards about older workers' competencies, the risks of unfair discrimination compel application of a rigorous RFOA provision.

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[29] Some courts have maintained that if age is at all overtly used as a differentiating criterion, the RFOA provision is not even applicable. *See, e.g.*, Equal Employment Opportunity Commn. v. City of New Castle, 32 Fair Empl. Prac. Cas. (BNA) 1409 (W.D. Pa. 1983), *aff'd. without opinion*, 34 Fair. Empl. Prac. Cas (BNA) 836 (3d Cir. 1984); *Popko* v. *City of Clairton*, 570 F.Supp. 446 (W.D. Pa. 1983); *Equal Opportunity Comm.* v. *County of Allegheny*, 519 F.Supp. 1328 (E.D. Pa. 1981), *aff'd.*, 705 F.2d 679 (3d Cir. 1983); *Marshall* v. *Goodyear Tire & Rubber Co.*, 22 Fair Empl. Prac. Cas. (BNA) 775 (W.D. Tenn. 1979). The EEOC interpretation of the RFOA defense asserts the same position: "When an employment practice uses age as a limiting criterion, the defense that the practice is justified by a reasonable factor other than age is unavailable." 29 C.F.R. §1625.7(c) (1984).

[30] *See Equal Employment Opportunity Comm.* v. *Wyoming*, ... U.S. ....., 103 S.Ct. 1054 (1983).

It is only when a defendant is charged with individual claims of wrongdoing vis-a-vis named plaintiffs that the standard *Burdine* formula may come into play. Here, the dangers of stereotypical thinking are minimal, since it is individual acts which are at issue. (Of course, if these acts are part of a pattern or practice resulting from an ageist policy, this analysis does not pertain.) Here, moreover, a ruling for the defendant will entail no harm to group members who were not before the court. In brief, the stakes are smaller, and so the guidance of *Burdine*, if this guidance appears to this Court to be at all apposite in the ADEA context, can come into play.[21]

CONCLUSION

The ADEA is a vitally important statute. It is the primary source of protection against a form of discrimination whose pervasiveness is clear. The BFOQ exception legitimizes discrimination by authorizing employers to act in ways which, but for the provision, would be unlawful. It follows that the exception must be narrowly construed. And so it further follows that the petitioner's attack on the rigor of the BFOQ defense must fail. Likewise, the RFOA provision offers an opening to employment discrimination. It, too, must be narrowly construed.

Respectfully submitted,

HOWARD C. EGLIT
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[21] The substance of the defendant's burden is beyond the scope of this case, and so the Court need not address the question of whether the defendant which invokes the RFOA exception in a situation where it constituted an affirmative defense must prove business necessity, as prescribed by 29 C.F.R. §1625.7(d) (1984), or something less.

AMICUS CURIAE

BRIEF

No. 83-1545 (13)

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

WESTERN AIR LINES, INC.
Petitioner,

v.

CHARLES G. CRISWELL, ALBERT RON
and RULON H. STARLEY,
Respondents.

WESTERN AIR LINES, INC.
Petitioner,

v.

WESTCOTT B. STONE, III, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE FOR AMERICAN CIVIL LIBERTIES UNION; EQUAL RIGHTS ADVOCATES; WOMEN'S EQUITY ACTION LEAGUE; AND WOMEN'S LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

Interest of Amici Curiae 2

Statement of the Facts 3

Summary of Argument. 6

Argument 12

The Age Discrimination in Employment Act Imposes Upon All Employers in Businesses Affecting Public Safety Who Seek to Establish a Mandatory Retirement Age Less than Seventy as a BFOQ the Burden of Proving that the BFOQ is Reasonably Necessary to Public Safety 12

A. The Extremely Narrow BFOQ Exception to Congress' Broad Remedial Prohibition Against Age Discrimination in Employment Would be Swallowed by the Broad Rule Proposed by Western 14

B. § 4(f)(1) Requires a Jury Evaluating an Airlines's BFOQ Defense to a Mandatory Age Sixty Retirement Policy for Flight Engineers to Consider Whether the Airline has Shown by a Preponderance of the Evidence that the Diaz and both Weeks Standards have been Satisfied. . 24

Conclusion 49

Appendix

TABLE OF AUTHORITIES

Cases — Page

Air Line Pilots Association v. Trans World Airlines, 713 F.2d 940 2d Cir. 1983), cert. granted sub nom, Trans World Airlines, Inc. v. Thurston, 104 S. Ct. 1412 (1984). 21,23,36

Arritt v. Grisell, 567 F.2d 1267 (4th Cir. 1977) 23,36

Beck v. Borough of Manheim, 505 F. Supp. 923 (E.D. Penn. 1981) . . . 28

Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332 (S.D. Ind. 1967) rev'd., 416 F.2d 711 (7th Cir. 1969) 22

Cheatwood v. South Central Bell Telephone and Telegraph Co., 303 F. Supp. 754 (M.D. Ala. (1969). 22

City of Los Angeles v. Manhart, 435 U.S. 702 (1978) 34

Connecticut v. Teal, 457 U.S. 440 (1982). 31

Corning Glass Works v. Brennan, 417 U.S. 188 (1974) 27,28

County of Washington v. Gunther, 452 U.S. 161 (1981) 27

Page

Criswell v. Western Air Lines, Inc., 514 F. Supp. 384 (C.D. Cal. 1981), aff'd, 709 F.2d 544 (9th Cir. 1983), cert. granted, 104 S.Ct. 2340 (1984) 5

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Dothard v. Rawlinson, 433 U.S. 321 (1977). . . . . passim

Equal Employment Opportunity Commission v. City of St. Paul, 671 F.2d 1162 (8th Cir. 1982) 23,30

Equal Employment Opportunity Commission v. County of Allegheny, 519 F. Supp. 1328 (W.D. Penn. 1981), aff'd, 705 F.2d 679 (3d Cir. 1983) (per curiam). 21

Equal Employment Opportunity Commission v. County of Los Angeles, 706 F.2d 1039 (9th Cir. 1983), cert. denied, 104 S.Ct. 984 (1984). 34

Equal Employment Opportunity Commission v. Jamesville, 630 F.2d 1254 (7th Cir. 1980) . . 27

Equal Employment Opportunity Commission v. University of Texas, 710 F.2d 1091 (5th Cir. 1983). 27

Page

Equal Employment Opportunity Commission v. Wyoming, 460 U.S. 226 (1983) 7,16,19

Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981). 34

Harriss v. Pan American World Airways, 649 F.2d 670 (9th Cir. 1980) 23,36

Hodgson v. Greyhound Lines, Inc., 449 F.2d 859 (7th Cir. 1974), cert. denied sub nom, Brennan v. Greyhound Lines, Inc., 419 U.S. 1122 (1975). . . . 39

Houghton v. McDonnell Douglas Corporation, 553 F.2d 561 (8th Cir.), cert. denied, 438 U.S. 966 (1977) . . . . . passim

Jackson v. Seaboard Coast Line Railroad Co., 678 F.2d 992 (11th Cir. 1982). 28

Johnson v. American Airlines, Inc., No. 83-1610, slip op. (5th Cir. November 8, 1984) . . . 23

Laugesen v. Anacondan Company, 510 F.2d 307 (6th Cir. 1975). . . 27,28

Lorillard v. Pons, 434 U.S. 575 (1978). 6,19

MacLennan v. American Airlines, Inc., 440 F. Supp. 466 (E.D. Va. 1977) 23

Page

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Marshall v. Westinghouse Electric Corporation, 576 F.2d 588 (5th Cir.), reh'g. denied, 582 F.2d 966 (1978) 28

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Smallwood v. United Airlines, Inc., 661 F.2d 303 (4th Cir. 1981), cert. denied, 456 U.S. 1007 (1982). 34

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Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). 32

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Usery v. Tamiani Trail Tours, 531 F.2d 224 (5th Cir. 1976). . . passim

Weeks v. Southern Bell Telephone and Telegraph Company, 408 F.2d 228 (5th Cir. 1969) 22,29,37

Page

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42 U.S.C. § 2000e-2(e)(1970) 18

29 U.S.C. § 621(b)(1984) 16

29 U.S.C. § 623(a)(1984) 16

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29 U.S.C. § 633(a)(1976 ed. and Supp. V). 20

Federal Regulations

14 C.F.R. § 42.40(c) 46

Airmen and Crewmember Requirements, 14 C.F.R. § 121.383(c)(1984). . . 10,46

Age Discrimination in Employment Interpretations, 29 C.F.R. § 860.102(b)(1976) 20,27,44

Age Discrimination in Employment Act Interpretations, 29 C.F.R. § 1625.6 (1984). . . . 20,27, 44,45

Final Interpretation: Age Discrimination in Employment Act, 29 C.F.R. § 1625.6 (1981) . .20,27

Page

29 C.F.R. § 1625.7(f)(1984) 34

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Age Discrimination in Employment: Hearings on H.R. 3641 et al. before the General Subcommittee on Labor of the House Committee on Education and Labor, 90th Congress, 1st Session (1967). . . 15

Hearings on S.830 and S.788 Before the Subcommittee on Labor and Public Welfare, 90th Congress, 1st Session (1967) 15

House Conference Committee, Age Discrimination in Employment Act Amendments of 1978, H. Conference Rep. No. 950, 95th Cong., 2d Sess., reprinted in 1978 U.S. Code Cong. & Admin. News 503 43

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Page

SPECIAL MESSAGE TO THE CONGRESS PROPOSING PROGRAMS FOR OLDER AMERICANS, 1 PUBLIC PAPERS OF THE PRESIDENTS, LYNDON B. JOHNSON (1968). 15

U.S. DEPARTIEMT OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT, REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964: RESEARCH MATERIALS (1965) 14

Other Authorities

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

83-1545

WESTERN AIR LINES, INC.
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V.

CHARLES G. CRISWELL, ALBERT RON and RULON H. STARLEY,
RESPONDENTS.

WESTERN AIRLINES, INC.
PETITIONER,

V.

WESTCOTT B. STONE, III, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE FOR AMERICAN CIVIL LIBERTIES UNION; EQUAL RIGHTS ADVOCATES; WOMEN'S EQUITY ACTION LEAGUE; AND WOMEN'S LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE

This brief amicus curiae in support of respondent is submitted on behalf of the American Civil Liberties Union; Equal Rights Advocates; Women's Equity Action League; and Women's Legal Defense Fund.1 These organizations are dedicated to the principle of equal treatment under the law and to the elimination of discrimination in employment.2 Amici believe that this case is of great importance for the full effectuation of the ADEA's and Title VII's twin mandates to eliminate employment discrimination, and urge this Court to adopt a restrictive interpretation of the ADEA BFOQ defense in order to fulfill this important Congressional goal, as this Court

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1. Letters from counsel for the parties consenting to the filing of this brief are being filed with the Clerk.

2. Statements describing each organization appear in the Appendix to this brief.

has done under Title VII.

STATEMENT OF THE FACTS

Respondents, Charles G. Criswell, Rulon H. Starley, and Albert Ron, each worked for petitioner Western Airlines, Inc. ("Western") for over thirty years. Criswell worked as a pilot for thirty-seven years, Starley worked as a pilot or copilot for thirty-two years, and Ron worked as a career flight engineer for twenty-four years (A32-34).3 Pursuant to its mandatory age sixty retirement rule for all flight deck personnel, Western required each respondent to retire when he reached his sixtieth birthday in 1978 (A32-34). On the basis of this policy, the airline denied a bid by Starley, Ron, and Criswell to continue employment as flight engineer, the third

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3. Citations in the form "A __" are to the Appendix to the Petition for a Writ of Certiorari.

member of a three person flight crew on a wide-bodied aircraft (A32-34).

Respondents brought suit under the Age Discrimination in Employment Act of 1967 ("ADEA"), claiming that the refusal to continue them in employment as flight engineers after their sixtieth birthdays constituted unlawful discrimination on the basis of age (A31). Western conceded that these facts constituted a prima facie violation of the ADEA, but defended its policy of requiring that flight officers be younger than age sixty as, inter alia, a bona fide occupational qualification ("BFOQ") excepted under § 4(f)(1) of the statute (A34).

After a fifteen day jury trial, the jury returned verdicts and damage assessments in favor of both plaintiffs (A32). After additional hearings and briefing, the presiding District Court for the Central District of California filed an opinion and

order which set out findings of facts, including a concurrence in the jury's finding that Western had not met its burden of proof on the BFOQ defense, and granted individual and systemwide injunctive relief, Criswell v. Western Air Lines, Inc., 514 F. Supp 384 (C.D. Cal. 1981)(A31-58). In a subsequent age discrimination case brought by respondent Stone the same District Court gave collateral estoppel effect to the Criswell judgment and granted preliminary injunctive relief to the one plaintiff who was a flight engineer for Western. Stone v. Western Air Lines, Inc., No. 81-5521 (C.D. Cal. December 17, 1981). On appeal, the Court of Appeals for the Ninth Circuit affirmed both decisions. Criswell v. Western Air Lines, 709 F.2d 544 (9th Cir. 1983) (A 1-30).

SUMMARY OF ARGUMENT

The ruling of the courts below, rejecting Western's "rational basis in fact" formulation of the BFOQ standard in ADEA cases, should be affirmed by this Court. This broad BFOQ standard would defeat Congress' important remedial goal of eliminating arbitrary age discrimination in employment by placing back in the hands of any employer expressing a public safety goal the decision of whether to discriminate on the basis of age.

The deference to employers which Western urges would add a public safety exception to the ADEA where Congress has never even considered doing so. This Court has recognized that the ADEA broadly prohibits age discrimiation in employment, Lorillard v. Pons, 434 U.S. 575, 577 (1978), and that the narrowly phrased BFOQ defense justifies age-based employment criteria only occa-

sionally, Equal Employment Opportunity Commission v. Wyoming, 460 U.S. 226, 233 (1983). Similarly, the enforcement agencies charged with administering the statute consistently have called for limited application of this exception to otherwise illegal age discrimination. Accordingly, rather than revert to the analysis of early discredited employment discrimination decisions, the vast majority of courts have rejected the rational basis standard in age BFOQ cases in order to avoid swallowing the rule against discrimination.

Both the District Court and Ninth Circuit correctly recognized that the jury charge on the BFOQ defense accorded sufficient deference to Western's need to preserve the safety of its flights. The instruction properly predicated the defense upon a showing by a preponderance of the evidence that: 1) the mandatory retirement policy for flight engineers was necessary to the

safe transportation of air passengers; 2) when respondents were forced to retire in 1978, it was highly impractical to determine on an individual basis the ability of each flight engineer over age sixty to perform his job safely; and 3) some members of the excluded group possess traits which preclude safe and efficient job performance that cannot be ascertained by means other than their age (A8-9).

This statement of the law is faithful to the broad remedial nature of the ADEA, its legislative intent, the EEOC interpretive guidelines and the BFOQ safety standard first set out by the Fifth Circuit in Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 235 (5th Cir. 1976), and adopted by the Ninth Circuit and most other federal courts. Contrary to Western's assertions, it does not require an airline to prove a safety risk to a certainty, in order to prevail under a BFOQ. Rather, this test merely

requires an airline to show that it is more likely than not that public safety will be endangered if flight engineers between age sixty and seventy are allowed to continue working and that this safety risk cannot be avoided practically through individual testing of the flight engineers for problems which would prevent them from safely continuing their duties. The jury charge deviated from the statutory mandate and legal precedent only in that it gave an excess of discretion to the airline by requiring only that "some", rather than substantially all, members of the excluded group possess unsafe traits. Tamiami, 531 F.2d at 235.

The record in this case demonstrates that the Tamiami standard allows businesses to manage genuine public safety risks more than sufficiently. Western seeks to justify its flight engineer retirement policy by essentially bootstrapping onto the Federal

Aviation Administration (hereinafter "FAA") age sixty retirement rule for pilots, 14 C.F.R. § 121.383(c) (1984), which that agency has specifically refused to apply to flight engineers, 49 Fed. Reg. 14,692 (1984). However, the District Court found, inter alia, that: the FAA has never extended this rule to flight engineers; approximately half of the commercial air carriers have not imposed mandatory age sixty retirement on flight engineers; flight engineers do not manipulate flight controls so that their duties are less critical to flight safety than those of a pilot; Western's one medical expert, a former FAA deputy Federal Air Surgeon, never recommended applying the age sixty rule to flight engineers; tragedies had resulted from incapacitated pilots but never from flight engineers; and the FAA and airlines have dealt with pilots' serious health problems (e.g., alcoholism and cardiovascular disease) by recertifying them

as flight engineers (A36-39), thus indicating that individualized testing for ability to perform duties is indeed possible.

In light of this record, it is clear that Western's judgment in imposing the contested flight engineer retirement policy was in fact not warranted by genuine safety considerations but was instead the kind of arbitrary age line that the ADEA was intended to prohibit. A standard for evaluating BFOQ defenses which would allow such a judgment to shield age discrimination from ADEA prohibitions on the employer's simple (and self-interested) say-so would unnecessarily and fundamentally undermine the important Congressional purpose of eliminating arbitrary age discrimination in the workplace.

ARGUMENT

THE AGE DISCRIMINATION IN EMPLOYMENT ACT IMPOSES UPON ALL EMPLOYERS IN INDUSTRIES AFFECTING PUBLIC SAFETY WHO SEEK TO ESTABLISH A MANDATORY RETIREMENT AGE LESS THAN SEVENTY AS A BFOQ THE BURDEN OF PROVING THAT THE BFOQ IS REASONABLY NECESSARY TO PUBLIC SAFETY.

Introduction

The issue before this Court is the proper standard to be applied by a jury in evaluating an airline's BFOQ defense to a mandatory age sixty retirement policy for flight engineers. Petitioner airline contends that § 4(f)(1) of the Age Discrimination in Employment Act should be interpreted to require district courts presiding over age discrimination trials to grant a judgment notwithstanding the verdict in favor of an employer in a business affecting public safety whenever the employer articulates a reasonable basis for imposing a mandatory retirement age. Amici submit that this rule does not strike a

proper balance between the important public interest in safety and the codified prohibition of arbitrary age discrimination in employment.

Moreover, this proposal, which essentially would exempt industries affecting public safety from the scope of the ADEA, is contrary to the terms of the ADEA, the intent of its authors, and the consistent interpretation of the enforcing agency. It finds no support in principle or in judicial application of this federal statute. The record in this case demonstrates that such unfettered discretion to employers would insulate age discrimination upon the incantation of a public safety interest without measurably advancing that interest.

For these reasons, amici curiae urge affirmance of the Ninth Circuit's approval of a District Court jury charge requiring that petitioner's mandatory age sixty retirement policy for flight engineers be

reasonably necessary to safety and supported by a preponderance of the evidence. The Ninth Circuit's approval of the District Court's BFOQ instruction is supported by the terms, structure, and remedial nature of the statute, and strikes a sound balance between the substantial interests at stake.

A. THE EXTREMELY NARROW BFOQ EXCEPTION TO CONGRESS' BROAD REMEDIAL PROHIBITION AGAINST AGE DISCRIMINATION IN EMPLOYMENT WOULD BE SWALLOWED BY THE BROAD RULE PROPOSED BY WESTERN.

The Secretary of Labor reported to Congress in 1965 that age discrimination in employment had become a national problem. U.S. DEPARTMENT OF LABOR, THE OLDER AMERICAN WORKER: ACE DISCRIMINATION IN EMPLOYMENT REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964 (1965). Aided by the Department of Labor, both Congress and the Executive Branch undertook an extensive factfinding process in preparation for the

promulgation of legislation prohibiting age discrimination in employment. E.g., SPECIAL MESSAGE TO THE CONGRESS PROPOSING PROGRAMS FOR OLDER AMERICANS, 1 PUBLIC PAPERS OF THE PRESIDENTS, LYNDON B. JOHNSON (1968); Hearings on S. 830 and S. 788 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. (1967); Age Discrimination in Employment: Hearings on H. R. 3651 et al. before the General Subcommittee on Labor of the House Committee on Education and Labor, 90th Cong., 1st Sess. (1967).

The findings which formed the basis of the ADEA included the following: (1) Age discrimination was premised primarily upon stereotypes unsupported by objective fact, and often was defended on grounds different from its actual causes, and (2) Arbitrary age lines were in fact generally unfounded, and the performance of older workers was at least as good as that of younger workers.

Equal Employment Opportunity Commission v. Wyoming, 460 U.S. 226, 230-31 (1983).

Congress' goals in passing this remedial legislation in 1967 were threefold: "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b) (1984). In order to accomplish these goals, Congress declared it unlawful, inter alia, for an employer "...to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age". 29 U.S.C. § 623(a) (1984).

After additional study, Congress amended the ADEA in 1978, Age Discrimination in Employment Act Amendments of 1978, 92 Stat. 189, to further "protect older workers from

involuntary retirement" by, inter alia, raising the upper age limit of the protected group from sixty-five to seventy and clarifying the exception for bona fide seniority systems and employee benefit plans to prohibit mandatory retirement pursuant to such systems or plans. The Senate committee which recommended these amendments based them upon its finding that "the arguments for retaining existing mandatory retirement policies are largely based on misconceptions rather than upon a careful analysis of the facts." Senate Committee on Human Resources, Age Discrimination in Employment Act Amendments of 1978, S. Rep. No. 493, 95th Cong., 2d Sess. [hereinafter "Senate Report"], reprinted in 1978 U.S. Code Cong. & Ad. News 503, 504-07, 512.

The ADEA contains three affirmative defenses, 29 U.S.C. § 623(f)(1)(1984) (bona fide benefit plan of which age is an integral part, and bona fide occupational

qualification); 29 U.S.C. § 623(f)(2)(1984) (bona fide seniority system), among which the BFOQ is the most litigated. Striking a Balance Between the Interests of Public Safety and the Rights of Older Workers: The Age BFOQ Defense, 39 Wash. & Lee L. Rev. 1371, 1373 & n.19 (1982) (citing Rosenblum, Age Discrimination in Employment and the Permissibility of Occupational Age Restrictions, 32 Hastings L.J. 1261, 1266 (1981)). This exception allows otherwise illegal discrimination "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business", 29 U.S.C. § 623(f)(1) (1984).

This Court in Dothard v. Rawlinson, 433 U.S. 321, 333 (1977), interpreted the virtually identical language in the BFOQ exception to Title VII, 42 U.S.C. § 2000e-2 (e) (1970), to "provide[] only the narrowest of exceptions to the general rule requiring

equality of employment opportunities". The Court drew the conclusion that the BFOQ exception was meant to be a narrow one from the "restrictive language" of the provision, the relevant legislative history, and "the consistent interpretation of the Equal Employment Opportunity Commission". Id. at 334.

This Court has proclaimed that, "The ADEA broadly prohibits arbitrary discrimination in the workplace based on age." Lorillard v. Pons, 434 U.S. 575, 577 (1978)(citation omitted). In a recent analysis of the age BFOQ provision, the Court explained that the defense was added to the legislation "in recognition of the fact that even criteria that are based on age are occasionally justified". Equal Employment Opportunity Commission v. Wyoming, 460 U.S. at 233 (emphasis added). Consonant with this interpretation, regulations promulgated by both the Department of Labor and the Equal

Employment Opportunity Commission (hereinafter "EEOC"), the federal agencies consecutively responsible for interpreting and administering the ADEA, see Age Discrimination in Employment Act Amendments of 1978, § 15, 92 Stat. 189, 29 U.S.C. § 633a (1976 ed. and Supp. V), consistently have provided that the BFOQ has "limited scope and application" and "must be construed narrowly". Age Discrimination in Employment Interpretations, 29 C.F.R. § 860.102(b) (1976); Final Interpretation: Age Discrimination in Employment Act, 29 C.F.R. § 1625.6 (1981); Age Discrimination in Employment Act Interpretations, 29 C.F.R. § 1625.6 (1984).

Thus, the indicia to which this Court looked in Dothard to determine the breadth of the BFOQ exception compel equally limited availability of this defense to ADEA liability. The federal courts have concurred that this exception to the broad

prohibition against age discrimination must be construed narrowly. E.g., Air Line Pilots Association v. Trans World Airlines, 713 F.2d 940, 954 (2d Cir. 1983), cert. granted sub nom., Trans World Airlines, Inc. v. Thurston, 104 S.Ct 1412 (1984) [hereinafter ALPA]; Orzel v. City of Wauwatosa Fire Department 697 F.2d 743, 748 (7th Cir. 1983), cert. denied, 104 S.Ct. 484 (1984); Houghton v. McDonnell Douglas Corporation, 553 F.2d 561, 564 (8th Cir.), cert. denied, 438 U.S. 966 (1977); Equal Employment Opportunity Commission v. County of Allegheny, 519 F. Supp. 1328, 1334 (W.D. Penn. 1981), aff'd, 705 F.2d 679 (3d Cir. 1983)(per curiam).

Clearly, availability of this defense to any employer who incants a public safety rationale would not be consistent with either this construction or the broad remedial goals of the legislation. The analysis would revert to that of early Title

VII cases, where articulation of "generally recognized capabiliities" or otherwise "rational" bases were allowed to support BFOQ defenses. E.g., Rowe v. Colgate-Palmolive Co., 272 F. Supp. 332, 365 (S.D. Ind. 1967), rev'd, 416 F.2d 711 (7th Cir. 1969). This toothless standard was quickly rejected "for the very good reason that if it were followed the bona fide occupational exception would swallow the rule against discrimination." Cheatwood v. South Central Bell Telephone & Telegraph Company, 303 F. Supp. 754 (M.D. Ala. 1969)(following Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228 (5th Cir. 1969)).

Precepts against judicial overreaching aside, the vast majority of courts have rejected substitution of the standard "reasonable" for "reasonably necessary," as Western proposes here, in both ADEA and Title VII public safety cases, on the basis that "the incantation of a safety rationale

is not an abracadabra to which this Court must defer judgment". Maclennan v. American Airlines, Inc., 440 F. Supp. 466, 472 (E.D. Va. 1977). Accord, Johnson v. American Airlines, Inc., No. 83-1610, slip op. at 674 (5th Cir. November 8, 1984); Orzel, 697 F.2d at 749, 752; Equal Employment Opportunity Commission v. City of St. Paul, 671 F.2d 1162, 1166 & n.7 (8th Cir. 1982); Harriss v. Pan American World Airways, 649 F.2d 670, 677 (9th Cir. 1980); Tuohy v. Ford Motor Co., 675 F.2d 842, 845 (6th Cir, 1982); Arritt v. Grisell, 567 F.2d 1267, 1271 (4th Cir. 1977); Houghton v. McDonnell Douglas Corporation, 553 F.2d at 564; ALPA, 713 F.2d at 954. Amici urge this Court likewise to reject the toothless "reasonable" standard because only the standard of "reasonably necessary" is loyal to the "terms and spirit" of the ADEA, ALPA, 713 F.2d at 954. See A New Interpretation of the BFOQ Exception Under the ADEA: A Remedy for the

Exception that Swallowed the Rule, 31 Am. U.L. Rev. 391 (1982); The Scope of the Bona Fide Occupational Qualification Exemption Under the Age Discrimination in Employment Act, 57 Chi.- Kent L. Rev. 1145 (1981).

B. § 4(f)(1) REQUIRES A JURY EVALUATING AN AIRLINES'S BFOQ DEFENSE TO A MANDATORY AGE SIXTY RETIREMENT POLICY FOR FLIGHT ENGINEERS TO CONSIDER WHETHER THE AIRLINE HAS SHOWN BY A PREPONDERANCE OF THE EVIDENCE THAT THE DIAZ AND BOTH WEEKS STANDARDS HAVE BEEN SATISFIED.

The District Court and Ninth Circuit correctly held that Western had the burden of proving by a preponderance of the evidence that the policy of involuntarily retiring flight engineers at age sixty was necessary to the safe transportation of passengers. This is the only interpretation faithful to the broad remedial nature of the ADEA, as anything less would convert the narrow BFOQ exception into a liability escape valve.

The District Court's jury charge

predicated the BFOQ defense upon a showing by a preponderance of the evidence that: 1) the mandatory retirement policy for flight engineers was necessary to the safe transportation of air passengers; 2) when respondents were forced to retire in 1978, it was highly impractical to determine on an individual basis the ability of each flight engineer over age sixty to perform his job safely; and 3) some members of the excluded group possess traits which preclude safe and efficient job performance that cannot be ascertained by means other that their age (A8-9).4

Western contends that this instruction was deficient in that it did not accord sufficient deference to the airline's business judgment and required the airline to prove a safety risk "to a certainty".

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4. A full transcription of the District Court's jury instruction on the BFOQ defense appears in the Appendix to this brief.

Petitioner's Brief at 13, 35, 42-43. Rather than require proof of a safety risk to a certainty, however, this charge merely required the airline to show that it was more likely than not that public safety would be endangered if flight engineers between age sixty and seventy were allowed to continue working until individualized tests revealed they could no longer do so safely, and that any risk to public safety could not be avoided practically through individual testing. If anything, the District Court granted an excess of discretion to the airline by failing to require that substantially all members of the excluded group possess unsafe traits (an essential element of the Weeks standard). The Court required only that some members of the excluded group possess unsafe traits. But Western was unable to adduce sufficient evidence to meet even this low burden.

The courts are in agreement that

employers bear the burden of establishing a BFOQ defense under the ADEA. E.g., Equal Employment Opportunity Commission v. University of Texas, 710 F.2d 1091 (5th Cir. 1983); Orzel, 697 F.2d at 751; Equal Employment Opportunity Commission v. Janesville, 630 F.2d 1254 (7th Cir. 1980); Houghton v. McDonnell Douglas, 533 F.2d at 564 (8th Cir.); Laugesen v. Anacondan Company, 510 F.2d 307 (6th Cir. 1975). The administrative guidelines consistently have joined in this consensus that the employer bears the burden of proving that this exception applies to him. 29 C.F.R. § 860.102(b)(1976); 29 C.F.R. § 1625.6(b) (1981); 29 C.F.R. § 1625.6(b)(1984).

This view is a necessary corollary of this Court's treatment of statutory exemptions to remedial statutes as affirmative defenses, County of Washington v. Gunther, 452 U.S. 161, 168 (1981) (Title VII and Equal Pay Act); Corning Glass Works

v. Brennan, 417 U.S. 188, 196-97 (1974) (Equal Pay Act); accord Jackson v. Seaboard Coast Line Railroad Co., 678 F.2d 992, 1012-13 (11th Cir. 1982) (Title VII), which must be proved by their beneficiaries, Corning Glass Works, 417 U.S. at 1[illegible]-97; accord Marshall v. Westinghouse Electric Corporation, 576 F.2d 588, 591 (5th Cir.), reh'g denied, 582 F.2d 966 (1978); (BFOQ provision in ADEA); Laugesen v. Anaconda Co., 510 F.2d at 307 (BFOQ provision in ADEA); Beck v. Borough of Manheim, 505 F. Supp. 923, 924-25 (E.D. Pa. 1981) (BFOQ provision in ADEA); Striking a Balance, supra at 1373 & n.20 (BFOQ provision in ADEA). This burden is met by marshalling a propensity of the evidence rather than by proving to a certainty entitlement to the exemption.

Western asks this Court to redefine the protections of the ADEA by reducing the employer's burden as follows:

> As long as a specific job qualification is reasonable in light of the safety risks, the fact finder should not be permitted to second guess an airline's judgment as to how stringent job qualifications must be to ensure the safe operation of its business.

Petitioner's Brief at 35. This proposal is simply a restatement of the rational basis test discarded by Weeks, 408 F.2d at 232-36, and its progeny as ineffectual in carrying out the statutory mandate to eliminate arbitrary employment discrimination.

Such a light burden would defeat Congress' stated intent to allow only that discrimination which has been shown by objective fact to be reasonably necessary to the normal operation of the employer's business. Under Western's proposal, a discriminatory policy would pass muster whenever an employer in the business of transporting the public claims that age has a general debilitating effect and that the job involves safety risks, without any

factual showing that large numbers of persons in that job over the age line have problems that cannot be tested for, and that these problems actually will create real safety risks. Petitioner's Brief at 31 & n.25. Thus, an airline could with the same ease justify forcing retirement upon older pilots or cabin stewards on the ground that they must deal with safety problems in emergency situations and that older persons generally are less able to do so. Cf. Equal Employment Opportunity Commission v. City of St. Paul, 671 F.2d at 1168 (medical evidence showing general debilitating effects of age insufficient to show that age is a BFOQ); Houghton v. McDonnell Douglas Corporation, 553 F.2d at 563-64 (evidence applicable only to the general population sheds little light on the relative capabilities of test pilots); Diaz, 442 F.2d at 388-89 (rejecting an analogous attempt not to employ stewards based on sex). This is precisely the

arbitrariness which the ADEA was enacted to protect against.

As this Court has emphasized in the Title VII context, the prohibition of discrimination based upon stereotypes necessarily requires that individuals be treated according to their individual abilities rather than normative characteristics of groups to which they belong, Dothard, 433 U.S. 333 & n.17. Western's rational basis test would ignore this basic proposition by allowing the incantation of an interest in public safety to justify a ban on female pilots because they might become pregnant or on forty-five year old stewards because they might tire. This Court should, as it has in the past, reject Western's suggestion to add an exception to the prohibition of employment discrimination. Connecticut v. Teal, 457 U.S. 440, 452-53 (1982).

Petitioner would have this Court insulate blatantly discriminatory policies from

liability by according irrebutable presumption status to the public safety rationale in which they are couched. The illogic of this proposal is made manifest by the fact that it would subject those defendants who admit discrimination5 to a lighter burden and less likelihood of ultimate liability than those who deny discrimination. In disparate treatment cases where defendants deny they have acted "based on" sex or age, defendants who rebut an inference of discrimination by producing evidence of a legitimate, nondiscriminatory reason for the discrimination remain subject to liability if the plaintiff can prove that this reason is pretextual, Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254-56 (1981). Absurdly, petitioner's

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5. Any employer attempting a BFOQ defense has necessarily admitted a prima facie violation of Section 703(e) of Title VII or of Section 623(a) of the ADEA. See, e.g., Dothard, supra, at 332-33.

suggestion that the Court absolve airlines of liability when they articulate a reasonable basis for admitted discrimination would convert the admission of discrimination into a virtual free ticket to ignore the prohibitions of the ADEA.

Petitioner seeks to justify this anomalous rule on the basis that airlines, rather than judges or juries, are "in the business of avoiding and managing risks" to public safety. Petitioner's Brief at 35. This may be so, but airlines are also in the business of making money, a fact which gives them economic motives to discriminate against other and more expensive employees, and makes them self-interested in asserting possibly phony safety defenses. In short, their defenses must be subject to real scrutiny by courts to insure that they are factually based. Thus, the business judgment to which the airline invites this Court to defer involves assessments of

senior employees according to their expense as well as their abilities. "Economic considerations, however, cannot be the basis for a BFOQ - precisely those considerations were among the targets of the Act." Equal Employment Opportunity Commission v. County of Los Angeles, 706 F.2d 1039, 1042 (9th Cir. 1983), cert. denied, 104 S.Ct. 984 (1984)(quoting Smallwood v. United Airlines, Inc., 661 F.2d 303 (4th Cir. 1981), cert. denied, 456 U.S. 1007 (1982)). Accord, Orzel, 697 F.2d at 755; Geller v. Markham, 635 F.2d 1027, 1034 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981). See 29 C.F.R. § 1625.7(f)(1984) (differentiation based on average cost of older employees unlawful except where pursuant to § 4(f)(2) employee benefit plan). Cf. City of Los Angeles v. Manhart, 435 U.S. 702, 716 (1978)(cost-justification defense not available in Title VII action). In light of these conflicting employer interests,

adoption of petitioner's rule of deference would defeat the ADEA's purpose of ensuring that employment decisions affecting older persons are based upon their abilities. Houghton, 533 F.2d at 563-64 (acceptance of company's "intuitive judgment" regarding retirement age for test pilots would allow the BFOQ exception to swallow the rule against age discrimination).

The compelling interest in public safety does not require that a new public safety exception be added to the ADEA by judicial fiat. Rather, amici propose that this Court adopt the following standard for the fact-finder to use in evaluating a BFOQ defense. This standard strikes a proper balance between the interests in safety and the employment of older individuals:

> First, the classification must be reasonably necessary to the essence of the employer's business; second, the employer must have a factual basis for believing either that all or substantially all persons within the excluded class would be unable to perform

> safely and efficiently the duties of the job; third, the employer must have a factual basis for believing that it is impossible or highly impractical to deal with persons over the age limit on an individualized basis.

This is essentially the test which the vast majority of courts follow in BFOQ cases involving public safety. The only difference is that most courts state the second and third factors in the alternative. E.g., Mahoney v. Trabucco, 738 F.2d 35 (1st Cir. 1984); ALPA, 713 F.2d at 940 (2d Cir.); Orzel, 697 F.2d at 743 (7th Cir.); Tuohy v. Ford Motor Co., 675 F.2d 842 (6th Cir. 1982); Harriss v. Pan American World Airways, 649 F.2d 670 (9th Cir. 1980); Arritt v. Grisell, 567 F.2d 1267 (4th Cir. 1977); Houghton, 553 F.2d at 561 (8th Cir.); Usery v. Tamiami Trail Tours, 531 F.2d 224 (5th Cir. 1976). The District Court's jury charge in the instant case basically incorporated this standard, although without requiring a finding that substantially all

flight engineers between sixty and seventy be unable to perform their jobs safely. (Instead, the Court required a finding only that some of such flight engineers be unable to perform their jobs safely.)

In the seminal public safety BFOQ case, Usery v. Tamiani Trail Tours, 531 F.2d at 224, the Fifth Circuit combined two tests developed in the sex discrimination area in Weeks v. Southern Bell Telephone and Telegraph Company, 408 F.2d 228 (5th Cir. 1969) and Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir.), cert. denied, 404 U.S. 950 (1971). Weeks imposed upon an employer seeking to establish a BFOQ "the burden of proving that he had a reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." 408 F.2d at 235. This test minimized the possibility that

stereotypes would be used as a basis for excluding members of a protected class. The appellate court added that a generalized rule could be supportable as well "where an employer sustains its burden in demonstrating that it is impos-sible or highly impractical to deal wih women on an individualized basis,". Id. at 235 n.5.

In Diaz, the Fifth Circuit added a threshold factor to the Weeks test. The court indicated that in addition to meeting the Weeks standards, an employer must satisfy the "reasonably necessary" requirement in § 703(e)(1) by showing that "the essence of the business operation would be undermined by not hiring members of one sex exclu-sively." 442 F.2d at 388-89.

In Dothard v. Rawlinson, 433 U.S. 321, 333 (1977), this Court considered both the Diaz and Weeks standards in holding that an Alabama regulation barring the employment of female contact guards within "peculiarly

inhospitable," all-male maximum-security penitentiaries qualified as a BFOQ. The Court emphasized the "narrow ambit of the bfoq exception" in reaching its conclusion based upon "substantial testimony from experts on both sides," and a Federal District Court's characterization of the idiosyncratic prison conditions as a "jungle atmosphere" accompanied by "rampant violence", so much so as to be "constitutionally intolerable." Id. at 334-36.

Similarly, in Tamiani, the Fifth Circuit rejected the Seventh Circuit's sole application of the Diaz standard, without reference to the Weeks standard, in the public safety context, see Hodgson v. Greyhound Lines, Inc., 449 F.2d 859 (7th Cir. 1974), cert. denied sub nom, Brennan v. Greyhound Lines, Inc., 419 U.S. 1122 (1975). Instead, the Court combined the Diaz and Weeks tests to require the following showing for an age BFOQ: first, the job qualifica-

tions must be reasonably necessary to the essence of the business, and second, all or substantially all persons in the excluded class would be unable to perform the job safely or efficiently or it would be impossible or highly impractical to differentiate the qualified from the unqualified applicants in that class on an indvidual basis. Tamiani, 531 F.2d at 234-35.

The Fifth Circuit in Tamiani factored the safety of third parties into the Diaz element, by holding that the job qualifications could be more stringent as the safety factor (measured by the likelihood and probable severity of the harm in case of an accident) increased. Id. at 236. In expressing the view that "courts must afford employers substantial - though not absolute - discretion in selecting specific safety standards and in judging their reasonableness," the Court made clear that this

deference was factored into the Diaz rather than the Weeks standard. Id. at 236 & nn.29 & 30. Thus, the safety interest excused the employer from demonstrating to a "certainty" its assessment of the risk of injury or death (i.e., that the essence of the job involves safety risks). Id. at 238. However, safety should not be a consideration in assessing the particular age line drawn (i.e., whether there is a factual basis for believing that all or substantially all members of the relevant age group are incapable of performing the job safely and efficiently), or whether members of the excluded group can be evaluated on an individual basis. See Orzel, 697 F.2d at 755.

During consideration of proposals to amend the ADEA in 1978, Congress implicitly aproved this standard for evaluating a BFOQ defense. The Senate report contained the following recommendation:

AMENDMENT TO SECTION 4(f)(1)

The committee intends to make clear that under this legislation an employer would not be required to retain anyone who is not qualified to perform a particular job. For example, in certain types of particularly arduous law enforcement activity, there may be a factual basis for believing that substantially all employees above a specified age would be unable to continue to perform safely and efficiently the duties of their particular jobs, and it may be impossible or impractical to determine through medical examinations, periodic reviews of current job performance and other objective tests the employees' capacity or ability to continue to perform the jobs safely and efficiently.

Accordingly, the committee adopted an amendment to make it clear that where these two conditions are satisfied and where such a bona fide occupational qualification has therefore been established, an employer may lawfully require mandatory retirement at that specified age.

Senate Report, supra, reprinted in 1978 U.S. Code Cong. & Ad. News 513-14.

The House Conference Report explained this provision as follows:

> The Senate amendment clarifies the meaning of section 4(f)(1) which provides that it is not unlawful to mandatorily retire an employee at an age less than the upper age limitation in the Age Discrimination in Employment Act of 1967 where the employer demonstrates that age is a bona fide occupational qualification.

House Conference Committee, Age Discrimination in Employment Act Amendments of 1978, H. Conference Rep. No. 950, 95th Cong., 2d Sess., reprinted in 1978 U.S. Code Cong. & Ad. News 528. While the conferees eventually withdrew the amendment from the legislative package, they did so because they agreed that the proposed amendment would not change existing law and was therefore unnecessary. Id. at 529.

Congress thus has expressed its view that § 4(f)(1) incorporates the Tamiami standard in public safety cases. Indeed, the legislature indicated that the employer has the burden of demonstrating that both Weeks requirements are met. By requiring Western to show only that some excluded flight engineers were unable to perform safely, the District Court herein did not impose this

full burden, but the jury nevertheless found Western did not meet even this lowered burden.

With respect to Western's concern with conflicting court decisions,6 this legislative history directs employers to seek consistency through advisory opinions from the EEOC,7 much as taxpayers do from

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6. The interpretive regulations have consistently called for a case-by-case determination of whether a BFOQ is "'bona fide' to a specific job and 'reasonably necessary to the normal operation of the particular business.'" E.g., 29 C.F.R. § 1625.6(a) (1984); 29 C.F.R. § 860.102(b) (1976).

7. The Senate report stated:

> The committee also expressed its concern that litigation should not be the sole means of determining the validity of a bona fide occupational qualification. Although the Secretary is presently empowered to issue advisory opinions on the applicability of BFOQ exception. [sic] The committee recommended that the Secretary examine the feasibility of issuing guidelines to aid employers in determining the applicability of section 4(f)(1).

Senate Report, supra, reprinted in 1978
(Footnote continued)

the Internal Revenue Service. In light of the narrow BFOQ standard consistently applied by this agency and the Labor Department,8 Western's resort instead to incantations of tragedies and inconsistencies, without any supporting evidence, is transparent.

Western seeks to justify retiring flight engineers at age sixty by invoking the inapplicable FAA age sixty retirement policy for the quite different jobs of pilots, Petitioner's Brief at 6. The FAA has imposed this retirement policy upon individuals "utilized ... as a pilot," but

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7.(continued)
U.S. Code Cong. & Ad. News 513-14.

8. The EEOC guidelines would allow the BFOQ to be used as a shield from liability by an employer asserting public safety only where the defendant satisifes the Weeks and Diaz standards and "prove[s] that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact." 29 C.F.R. § 1625.6(b) (1984).

not upon flight engineers, since 1959, compare Irregular Air Carrier and Off-Route Rules, 24 Fed. Reg. 9,776 (1959) (codified at 14 C.F.R. § 42.40(c)) with Airman and Crewmember Requirements, 14 C.F.R. § 121.383 (c) (1984). Indeed, that agency has explicitely decided not to apply the age sixty rule to flight engineers, Flight Crewmembers; Limitations on Use of Service, 49 Fed. Reg. 14,692 (April 12, 1984). The basis for this ruling was that "Available data is not sufficient in and of itself to support imposing a mandatory retirement age on flight engineers." Id. at 14,695. Thus, petitioner's policy by its own admission is wholly unfounded.

The record in this case demonstrates that the Tamiami standard more than sufficiently gives businesses which manage genuine public safety risks the latitude to do so by using age lines where they are factually supported. The District Court found a

significant distinction between the position of pilot and flight engineer in terms of the asserted safety interest: the flight engineer position on wide-bodied aircraft involves monitoring and adjusting systems such as the hydraulic and electrical systems, rather than manipulation of the flight controls. Thus, a flight engineer's "normal duties are less critical to the safety of flight than those of a pilot." Although these crew members have important contingency duties during emergencies, crew redundancy concepts employed by Western and other carriers can accommodate such situations. Moreover, although a number of tragedies have resulted from pilot incapacitations during flight, none has been caused by flight engineer incapacitation. (A37-38).

The trial court also found little support for Western's effort to bootstrap its involuntary retirement of flight engineers onto the FAA age sixty pilot retirement

rule: The FAA never has applied this rule to flight engineers and Western's one medical expert, a former FAA Deputy Federal Air Surgeon, has never recommended such application; over one-half of airline pilots are employed by carriers (such as TransWorld Airways, Pan American and American Airlines) which do not impose age sixty retirement on flight engineers; in excess of two hundred flight engineers over age sixty fly on wide-bodied aircraft without incident; and both the FAA and airlines have dealt with serious health problems (such as alcoholism and cardiovascular disease) of many younger pilots by downgrading their position to flight engineer. (A36-43).

Demonstrably, neither other airlines or the FAA have found retirement of flight engineers at sixty necessary to air safety. The dearth of evidence in this record tying air safety to the age of flight engineers belies Western's argument that public safety

will be advanced by simply deferring to the airlines' judgment regarding the "safest possible policy", Petitioner's Brief at 43.

CONCLUSION

In conclusion, amici curiae urge that the District Court in the case at bar was correct in charging the jury to apply the Diaz standard as well as both parts of the Weeks standard. Allowing either part of the Weeks test independently to support a BFOQ after the Diaz condition precedent is met is inconsistent with both the legislative intent expressed during consideration of the proposed amendment to the BFOQ provision, and with the ADEA purpose of treating older employees on the basis of their individual abilities. It is irrelevant that individualized testing is somewhat difficult if substantially all of the excluded group are qualified, and therefore deserve the ADEA protection. Conversely, where many members

of the excluded class are unqualified but an individualized test is quite practical, mandatory retirement of persons under seventy years of age should not be excused by the narrow BFOQ provision.

In light of the broad remedial goals of the ADEA, the narrowness of the BFOQ exception, and the fact that Congress in amending the legislation chose to strengthen its prohibitions on discrimination, and recognized the narrowness of the exception, the BFOQ standard proposed by amici curiae strikes the proper balance between the interests in public safety and in promoting employment of our older citizens without arbitrary and factually unsupportable age lines.

For the foregoing reasons, the amici curiae, Women's Legal Defense Fund, American Civil Liberties Union, Women's Equity Action League, and Equal Rights Advocates submit that the judgment of the United States Court

of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

DESCRIPTIONS OF AMICI CURIAE

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 250,000 members dedicated to protecting fundamental rights, including the right to equal treatment under the law. The ACLU has established the Women's Rights Project to help eliminate the pervasive problem of gender-based discrimination. It has participated, both directly and as amicus curiae, in the litigation of many cases before the Supreme Court and other courts challenging employment discrimination practices.

Equal Rights Advocates, Inc., is a San Francisco based, public intereste legal and educational corporation specializing in the area of sex discrimination. It has a long history of interst, activism and advocacy in all areas of the law which affect equality between the sexes. Equal Rights Advocates,

Inc. has been particularly concerned with gender equality in the work force because economic equality is fundamental to women's ability to achieve equality in other aspects of society.

Women's Equity Action League ("WEAL") is a national membership organization dedicated to securing legal and economic rights for women. WEAL's membership is committed to the full implementation of employment discrimination laws, and in particular the application of Title VII of the Civil Rights Act of 1964 to the full range of employment decisions affecting women.

Women's Legal Defense Fund is a non-profit, tax exempt membership organization, founded in 1971 to provide pro bono legal assistance to women who have been discriminated against on the basis of sex. The Fund devotes a major portion of its resources to combatting sex discrimination in employment, through litigation of signi-

ficant employment discrimination cases, operation of an employment discrimination counselling program, public education, and agency advocacy before the EEOC and other federal agencies that are charged with enforcement of equal opportunity laws.

The challenged jury instruction reads:

If you find that plaintiffs have persuaded you by a preponderance of the evidence that their involuntary retirements were the result of policies in which age discrimination was a determining factor, then you must consider defendant's defense that age is a "bona fide occupational qualification" for its Second Officers (flight engineers). This defense is usually abbreviated "BFOQ". The BFOQ defense is available only if it is reasonably necessary to the normal operation-essence-of defendant's business. In this regard, I instruct you that the normal operation-essence of Western's business is the safe transportation of air passengers.

The burden of proof to show a BFOQ is on the defendant. If defendant establishes such a BFOQ by a preponderance of the evidence, then its age discrimination is lawful under the ADEA.

One method by which defendant Western may establish a BFOQ in this case is to prove

(1) that in 1978, when these plaintiffs were retired, it was highly impractical for Western to deal with each Second Officer over age 60 on an individualized basis to determine his particular ability to perform his job safely, and

(2) that some Second Officers (flight engineers) over age 60 possess traits of physiological, psychological, or other nature which preclude safe and efficient job performance that cannot be ascertained by means other than knowing their age.

In evaluating the practicability to defendant Western of dealing with Second Officers over age 60 on an individualized basis, with respect to the medical testimony you should consider the state of the medical art as it existed in July 1978.

(A8-9).

REPLY

BRIEF

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No. 83-1545

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WESTERN AIR LINES, INC.,
Petitioner,

v.

CHARLES G. CRISWELL, ALBERT RON
and RULON H. STARLEY,
Respondents.

WESTERN AIR LINES, INC.,
Petitioner,

v.

WESTCOT B. STONE, III, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF WESTERN AIR LINES, INC.

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	2
The Trial Court Erred In Charging The Jury On The BFOQ Standard	3
The BFOQ Instruction Failed To Accord Western Any Discretion In Selecting Job Qualifications For Second Officers That Are Reasonable In Light Of The Safety Risks	4
The BFOQ Charge Omitted The "Factual Basis For Believing" Standard For Determining Whether It Is Practical For Western To Distinguish Between Those Who Do And Do Not Possess The Requisite Job Qualifications For Second Officers	7
The Trial Court Erred By Instructing The Jury That Western Was Required To Prove By A Preponderance Of The Evidence That Its Challenged Employment Decisions Were Based On Reasonable Factors Other Than Age	11
CONCLUSION	18

TABLE OF AUTHORITIES

Cases:	Page
Air Line Pilots Association, International v. Trans World Airlines, Inc., 713 F.2d 940 (2d Cir. 1983), *cert. granted sub nom. Trans World Airlines, Inc. v. Thurston*, 104 S. Ct. 1412 (1984)	17-18
Allison v. Western Union Telegraph Co., 680 F.2d 1318 (11th Cir. 1982)	15
Arritt v. Grisell, 567 F.2d 1267 (4th Cir. 1977)	6
Akins v. South Central Bell Telephone Co., 744 F.2d 1133 (5th Cir. 1984)	15
Board of Trustees v. Sweeny, 439 U.S. 24 (1978)	11
Condit v. United Airlines, Inc., 558 F.2d 1176 (4th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978)	8
Corning Glass Works v. Brennan, 417 U.S. 188 (1974)	14
County of Washington v. Gunther, 452 U.S. 161 (1981)	15-16, 16
Cova v. Coca-Cola Bottling Co., 574 F.2d 958 (8th Cir. 1978)	12
Criswell v. Western Air Lines, Inc., 709 F.2d 544 (9th Cir. 1983), *cert. granted*, 53 U.S.L.W. 3202 (U.S. 1984)	13
Dothard v. Rawlinson, 433 U.S. 321 (1977)	5
EEOC v. Missouri State Highway Patrol, 36 FEP Cases 401 (8th Cir. 1984)	3, 8, 9
EEOC v. University of Texas Health Science Center, 710 F.2d 1091 (5th Cir. 1983)	3, 8
Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978)	11, 12
Garner v. Boorstin, 690 F.2d 1034 (D.C. Cir. 1982)	12
Gathercole v. Global Associates, 727 F.2d 1485 (9th Cir.), *cert. denied*, 53 U.S.L.W. 3436 (U.S. 1984)	9
Griggs v. Duke Power Co., 401 U.S. 427 (1971)	16-17
Harriss v. Pan American World Airways, Inc., 649 F.2d 670 (9th Cir. 1980)	6
Hoefelman v. Conservation Commission of Missouri Department of Conservation, 718 F.2d 281 (8th Cir. 1983)	6, 8

TABLE OF AUTHORITIES—Continued

	Page
International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977)	11, 15
Johnson v. American Airlines, Inc., No. 83-1610 (5th Cir. Nov. 8, 1984)	8
Kentroti v. Frontier Air Lines, Inc., 585 F.2d 967 (10th Cir. 1978)	12
Kephart v. Institute of Gas Technology, 630 F.2d 1217 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981)	12
Krieg v. Paul Revere Life Insurance Co., 718 F.2d 998 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 1712 (1984)	12
Laffey v. Northwest Airlines, Inc., 740 F.2d 1071 (D.C. Cir. 1984)	16
Levin v. Delta Air Lines, Inc., 730 F.2d 994 (5th Cir. 1984)	6
Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979)	12, 13
Lorillard v. Pons, 434 U.S. 575 (1978)	15
Markham v. Geller, 451 U.S. 945 (1981)	15
Marshall v. Westinghouse Electric Corp., 576 F.2d 588 (5th Cir. 1978)	12, 13
Massarsky v. General Motors Corp., 706 F.2d 1011 (3rd Cir.), *cert. denied*, 104 S. Ct. 348 (1983)	15
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	11
Murnane v. American Airlines, Inc., 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982)	6
Orzel v. City of Wauwatosa Fire Department, 697 F.2d 743 (7th Cir.), *cert. denied*, 104 S. Ct. 484 (1983)	6
Smith v. University of North Carolina, 632 F.2d 316 (4th Cir. 1980)	12
Smithers v. Bailar, 629 F.2d 892 (3rd Cir. 1980)	12
Stanojev v. Ebasco Services, Inc., 643 F.2d 914 (2d Cir. 1981)	12
Sutton v. Atlantic Richfield Co., 646 F.2d 407 (9th Cir. 1981)	12

TABLE OF AUTHORITIES—Continued

	Page
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981)	11, 12
Tuohy v. Ford Motor Co., 675 F.2d 842 (6th Cir. 1982)	6, 8
Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1975)	4, 5, 9
Statutes:	
Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*	2
29 U.S.C. § 623(f)(2) (1976)	2
29 U.S.C. § 623(f)(1) (1982)	6, 15
29 U.S.C. § 623(f)(2) (1982)	17
Equal Pay Act 29 U.S.C. § 206(d)(1) (1982)	14
Regulations:	
24 Fed. Reg. 977 (1959)	9
49 Fed. Reg. 14695 (April 12, 1984)	9
Fed. R. Civ. P. 8(e)	14
Other Authorities:	
Age Discrimination in Employment Act Amendments of 1978, Pub. L. 95-256, 92 Stat. 189 (April 6, 1978)	2
Note, *Age Discrimination in Employment Act of 1967*, 90 Harv. L. Rev. 380 (1967)	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1545

WESTERN AIR LINES, INC.,
Petitioner,
v.
CHARLES G. CRISWELL, ALBERT RON and RULON H. STARLEY,
Respondents.

WESTERN AIR LINES, INC.,
Petitioner,
v.
WESTCOT B. STONE, III, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF WESTERN AIR LINES, INC.

Petitioner, Western Air Lines, Inc. (hereinafter "Western"), herein responds to Respondents' brief on the merits and the briefs submitted by the various amici curiae in support of Respondents.

ARGUMENT

The briefs submitted by Respondents and their amici are a somewhat surprising response to Western's brief on the merits. Rather than addressing the substantive legal issues in a straight forward manner, Respondents and their amici devote substantial portions of their respective briefs to a selective recitation of evidence purportedly undermining the factual basis of Western's BFOQ and RFOA defenses.

For example, both Respondents and their amici argue that safety considerations were not the basis for Western's policy of not allowing Second Officers to fly past age 60. This argument is premised on their contention that Respondents Criswell and Starley were told at the time they first requested to downbid to Second Officer positions in late 1977 that they would be retired at age 60 pursuant to the pilot retirement plan. Because the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (hereinafter "ADEA" or "Act"), at that time allowed mandatory retirement pursuant to the terms of a bona fide retirement plan, such as Western's pilot plan, it is hardly surprising that this was the stated reason given to Respondents. *See* JA 91-92. *See also* 29 U.S.C. § 623(f)(2) (1976).

What Respondents ignore, however, is the subsequent consideration given to their requests and the requests of others after the 1978 Amendments to the ADEA removed this retirement plan exception to the Act. *See* Age Discrimination in Employment Act Amendments of 1978, Pub. L. 95-256, 92 Stat. 189 (April 6, 1978). It was then that Western reexamined the rationale underlying its pilot retirement plan and reaffirmed that the rationale was a commitment to safety. In other words, prior to the 1978 Amendments it was not necessary for Western to articulate the underlying justification for its policy against allowing Second Officers to fly

past age 60, while after the 1978 Amendments it was. That justification was, of course, the focus of the trial of this case where Western maintained that, due to safety considerations, age less than 60 is a BFOQ for the position of Second Officer. For Respondents to argue that safety considerations were not the originally articulated basis for Western's policy, they must ignore the fact that the policy is currently justified by the substantial safety evidence presented by Western at the trial of this case.[1]

More importantly, by essentially rearguing their trial evidence here, Respondents misapprehend the issues before the Court. The issues presented in this petition do not concern what the conflicting evidence below demonstrated, but whether the jury was correctly instructed on the law so that it could properly weigh the evidence presented. With respect to these issues, it is clear that the district court's BFOQ and RFOA instructions were erroneous.

THE TRIAL COURT ERRED IN CHARGING THE JURY ON THE BFOQ STANDARD

Initially, it must be pointed out that Respondents and their amici substantially misrepresent Western's position

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[1] It should be noted that Respondents' arguments respecting Western's subjective motivation in prohibiting Second Officers from continuing to fly past age 60 are in direct conflict with the well-established principle that the BFOQ test focuses on *objective* evidence offered at trial, rather than the employer's original subjective motivations in adopting its challenged employment practice. *See EEOC v. Missouri State Highway Patrol*, 36 FEP Cases 401 (8th Cir. 1984); *EEOC v. University of Texas Health Science Center*, 710 F.2d 1091, 1096 (5th Cir. 1983). As the Fifth Circuit stated in *University of Texas Health Science Center*, the BFOQ test requires:

> [T]he defendant to demonstrate *at trial*, with *objective* evidence, that the age qualification is justified, rather than looking to the subjective motivation originally behind the qualification.

710 F.2d at 1096 (emphasis in original).

on this appeal with respect to the appropriate standard for evaluating an employer's BFOQ defense to a claim of age discrimination under the ADEA. Notwithstanding Respondents' repeated and transparent mischaracterizations, Western *does not* advocate a "subjective rational belief"[2] test for evaluating safety-based BFOQ claims. Rather, Western contends that in order to establish a BFOQ defense in safety cases an employer must prove by *objective evidence*: (1) that the duties of the job in question are related to the essence of the employer's business and that the job qualifications selected by the employer for the position are reasonable in light of the safety risks; *and* (2) that there is a *factual basis* for believing *either* that all or substantially all persons excluded by the challenged age limitation do not possess the selected job qualifications *or* that it is impossible or impractical to deal with such persons on an individualized basis. Moreover, Western *does not* contend that the trial court erred in requiring Western to establish each element of its BFOQ defense by a "preponderance of the evidence." Rather, Western contends that the district court's BFOQ charge simply failed to properly instruct the jury as to the elements of the BFOQ defense.

The BFOQ Instruction Failed To Accord Western Any Discretion In Selecting Job Qualifications For Second Officers That Are Reasonable In Light Of The Safety Risks

Respondents and their amici apparently agree that the appropriate standards for evaluating safety-based BFOQ claims under the ADEA are embodied in the two-prong BFOQ test originally formulated by the Fifth Circuit in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1975). Although Respondents disingenu-

[2] Respondents' Brief at 26-27. *See also* Brief of Amici EEOC at 11-12, 16-17; Brief of Amici ACLU at 6, 11; Brief of Amici National Council on Aging, Inc. *et al.*, at 5-6.

ously criticize Western for distorting the *Tamiami* test,[3] it is Respondents and their amici that have distorted the standards embodied in that test by ignoring critical aspects of the *Tamiami* decision itself.

As discussed more fully in Western's principal brief, in cases involving important safety considerations, the first prong of the *Tamiami* test requires that an employer be accorded flexibility and discretion in selecting job qualifications stringent enough to ensure safety. As the *Tamiami* court itself stated with respect to industries involving passenger safety:

> [T]he employer must be afforded *substantial discretion* in selecting specific standards which, if they err at all, should err on the side of preservation of life and limb. The employer must of course show a *reasonable basis* for its assessment of the risks of injury/death. But it cannot be expected to establish this to a certainty, for certainty would require running the risk until a tragic accident proved that the judgment was sound.

Id. at 238 (emphasis added). With the notable exception of the lower courts in this case, every court that has considered the issue of safety in the context of analyzing BFOQ claims has agreed that employers must be afforded substantial discretion in selecting specific safety standards and in judging their reasonableness. *See, e.g., Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977); *Condit v. United Airlines, Inc.*, 558 F.2d 1176 (4th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978);

[3] Respondents' mischaracterization of the standards advocated by Western is apparently the result of erroneously equating the requirement under the first part of the BFOQ test, that the employer prove his selected job qualifications are "reasonable" in light of the safety risks, with the ultimate issue of whether the challenged age limitation is "reasonably necessary" to the normal operation of the employer's business. This ultimate issue, of course, can only be decided after considering and applying both parts of the BFOQ test.

Arritt v. Grisell, 567 F.2d 1267 (4th Cir. 1977); *Levin v. Delta Air Lines, Inc.*, 730 F.2d 994 (5th Cir. 1984); *Tuohy v. Ford Motor Co.*, 675 F.2d 842 (6th Cir. 1982); *Orzel v. City of Wauwatosa Fire Department*, 697 F.2d 743 (7th Cir.), *cert. denied*, 104 S. Ct. 484 (1983); *Hoefelman v. Conservation Commission of Missouri Department of Conservation*, 718 F.2d 281 (8th Cir. 1983); *Harriss v. Pan American World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980); *Murnane v. American Airlines, Inc.*, 667 F.2d 98, 101 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982).

In the instant case, the district court's BFOQ instruction failed to even charge the jury on the first prong of the BFOQ test and there was no mention whatsoever of the deference due Western's selection of job qualifications that are reasonable in light of the safety risks.[4] In defending the BFOQ charge below, Respondents and their amici necessarily contend—in direct contradiction of the *Tamiami* decision itself—that Western was *not* entitled to exercise its special expertise in aviation safety in selecting job qualifications for the position of Second Officer that are reasonable in light of the safety risks.[5]

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[4] A plain reading of the district court's BFOQ instruction succinctly refutes Respondents' contention that the jury was charged on the first prong of the BFOQ test. *See* Respondents' Brief at 29-30. The third sentence of the BFOQ instruction, upon which Respondents apparently base their contention, is at best a paraphrase of the statutory description of the BFOQ exception contained in § 4(f)(1) of the Act. *See* 29 U.S.C. § 623(f)(1) (1982). And this is precisely what the district court intended it to be. *See* R.T. 2378. In any event, even if this sentence could be read as addressing the first part of the BFOQ test, the charge was nevertheless inadequate in that it failed to even mention the deference due Western's selection of stringent job qualifications that are reasonable in light of the safety risks.

[5] Respondents' assertion that there was no dispute over whether Western was entitled to set stringent job qualifications for Second Officers, or whether the duties of a Second Officer are reasonably

The BFOQ Charge Omitted The "Factual Basis For Believing" Standard For Determining Whether It Is Practical For Western To Distinguish Between Those Who Do And Do Not Possess The Requisite Job Qualifications For Second Officers

The arguments of Respondents and their amici respecting the nature of an employer's required showing under the second prong of the *Tamiami* test are equally unpersuasive.[6] Although Respondents acknowledge that the safety factor must be taken into account in evaluating an employer's showing under the second part of the test,[7] they contend that the employer should be required

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necessary to the safe operation of Western's aircraft, is belied by Respondents' own arguments respecting the relative importance to flight safety of Second Officers and other cockpit crew members, *see* Respondents' Brief at 13, as well as the district court's "finding" that Second Officers are not as important to safety. *See* A37-A38.

[6] As noted in Western's principal brief, the district court's failure to charge on the first prong of the test also tainted its charge with respect to the second prong of the BFOQ test. Under the second part of the test, the jury should have been asked to determine whether Western had demonstrated by a preponderance of the evidence the existence of a factual basis for its belief that it was impractical to determine which persons over age 60 do and do not possess the qualifications selected by Western for Second Officers, including the requirement that persons occupying that position be free of characteristics associated with an increased risk of sudden or subtle incapacitation. Under the instruction as given, however, the jury was asked to make its own *independent* determination as to whether persons over age 60 can perform the job of Second Officer *safely*, without regard to the job qualifications selected by Western to ensure safe performance. Although the jury could very well have found that medical science cannot identify those persons over age 60 that are subject to sudden or subtle incapacitation, there was nothing to prevent the jury from determining at the same time that persons over age 60 can perform the duties of a Second Officer *safely* because the jury disagreed with Western's determination that increased risk of incapacitation precludes *safe* job performance.

[7] *See* Respondents' Brief at 36. Of course, the BFOQ charge defended by Respondents here gave the jury no indication that

to prove by a preponderance of the evidence that it is *in fact* impossible or impractical to deal with individuals over the challenged age limit on an individualized basis. In addition to being based on a hyper-technical reading of the *Tamiami* decision and contrary to subsequent circuit court authority interpreting that decision,[8] Respondents' arguments totally disregard important policy considerations respecting the public interest in ensuring safe air transportation.

As discussed more fully in Western's principal brief, where qualified experts disagree as to whether persons over a certain age can be dealt with on an individual basis,[9] an employer must be allowed to resolve that con-

safety was a factor which might affect their assessment of the efficacy of Western's age limitation and the practicality of individualized screening.

Moreover, it should be noted that while Respondents and some of their amici argue so stridently that different standards should be applied to the "all or substantially all" and "impossible or impractical to distinguish" alternatives under the second prong of the BFOQ test, they offer no explanation why the standards should be different.

[8] *EEOC v. Missouri State Highway Patrol*, 36 FEP Cases 401 (8th Cir. 1984); *Johnson v. American Airlines, Inc.*, No. 83-1610 (5th Cir. Nov. 8, 1984); *EEOC v. University of Texas Health Science Center*, 710 F.2d 1091, 1093; *Tuohy v. Ford Motor Co.*, 675 F.2d at 846; *Hoefelman v. Conservation Commission of Missouri Department of Conservation*, 718 F.2d at 286 (McMillian, J., concurring). *See also* Note, *Age Discrimination in Employment Act of 1967*, 90 Harv. L. Rev. 380, 407 (1967).

[9] It cannot be seriously disputed that the evidence presented below demonstrated a bona fide disagreement among medical experts respecting the efficacy of present medical diagnostic techniques to accurately predict the likelihood of persons over age 60 suffering sudden or subtle incapacitation. In this respect, Respondents and their amici seriously misrepresent the testimony of Western's medical expert, Dr. Douglas E. Busby. Contrary to Respondents' assertions, Dr. Busby did not testify that he would be "comfortable" in all respects with persons over age 60 serving as Second Officers following a one-day examination at his clinic. *See* Respondents' Brief at 15. To the contrary, Dr. Busby testified that even though such an examination might be adequate to eliminate general "medical" problems associated with increasing age, present medical diagnostic techniques were *not* adequate to detect, on an individual basis, those persons over age 60 suffering from psychophysiological disorders that might affect their ability to safely perform the duties of a Second Officer. R.T. 1675-1679. As Dr. Busby explained, the psychophysiological disorders associated with increasing age include loss of short-term memory and the ability to process and respond to sensory information, and can have a significant effect on an individual's ability to react to changing and emergency situations. R.T. 1343-1348.

In any event, in addition to Dr. Busby's testimony, Western also relied on the FAA's findings that there are currently no methods to detect or predict with precision an individual's risk of sudden or subtle incapacitation in the face of known age-related risks. *See* 24 Fed. Reg. 977 (1959); 49 Fed. Reg. 14695 (April 12, 1984). The FAA's findings, coupled with the testimony of Dr. Busby, clearly showed that a factual basis existed for Western's belief that it is impossible to deal with persons over age 60 on an individual basis. *See Gathercole v. Global Associates*, 727 F.2d 1485 (9th Cir.), *cert. denied*, 53 U.S.L.W. 3436 (U.S. 1984).

[10] The present case provides a good example of the lack of uniformity inherent in permitting a jury to resolve bona fide conflicts among medical experts respecting the adequacy of individualized testing. Although the district court credited the testimony of Respondents' primary expert, Dr. Stanley R. Mohler, on this issue in this case, Dr. Mohler's testimony on the same issue has been severely criticized and rejected in other cases. *See, e.g., EEOC v. Missouri Highway Patrol*, 36 FEP Cases 401 (8th Cir. 1984) (reversing lower court finding that individualized testing of state

troversy in a conservative manner, erring, if at all, on the side of safety. *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d at 238. Although it might be appropriate to permit a jury to resolve a conflict among experts respecting the efficacy of individual evaluations where the only thing at stake is an individual plaintiff's interest in being free from arbitrary employment discrimination, in cases involving important safety interests of third parties, the consequences of an incorrect decision must be considered.[10] In short, where the safety of third parties

is at stake, and the evidence is such that reasonable persons could differ respecting the adequacy of individualized testing, the ADEA should require no more of an employer than that he prove the existence of a factual basis for his belief that individualized evaluations are impractical.[11]

By requiring Western to prove by a preponderance of the evidence that individualized determinations were *in fact* impossible or impractical, the trial court's BFOQ charge effectively instructed the jury that the rights of individuals under the ADEA are to be determined in the abstract without regard to the burdens their exercise might impose on others. This was clear error and requires reversal of the judgment below.[12]

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patrolmen is practical, largely on grounds that Dr. Mohler's testimony, upon which the finding was based, contained "serious deficiencies").

[11] Contrary to Respondents' contention, the standard advocated by Western does not make the BFOQ exception any broader than necessary. Under the first part of the BFOQ test the employer must demonstrate with *objective evidence* that a reasonable basis exists for its assessment of the safety risks giving rise to its stringent job qualifications. Moreover, once the employer's job qualifications have passed muster under the first part of the test, the employer must prove by a *preponderance of the evidence* that its belief that it is impractical to determine which persons over a certain age do not possess the selected job qualifications is founded upon a factual basis and not upon stereotyped characterizations concerning the ability of older workers.

[12] Respondents attempt to confuse the BFOQ issue by arguing that *portions* of the charge given below were requested by Western. In fact, none of the BFOQ charges requested by Western were given. The district court's BFOQ instruction was requested by neither side; rather, it represented the trial court's attempt to reconcile conflicting requests, as well as its own additions. R.T. 2368-2378, 2391-2394, 2404-2409. In any event, the question before this Court respecting the BFOQ charge is not who suggested which part of the language that went into this compromise charge. The issue on appeal is whether that charge correctly stated the parameters of the BFOQ defense.

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY THAT WESTERN WAS REQUIRED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT ITS CHALLENGED EMPLOYMENT DECISIONS WERE BASED ON REASONABLE FACTORS OTHER THAN AGE

The appropriate guidelines for allocating the burdens and presentation of proof in employment discrimination cases involving claims of disparate treatment are set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and its progeny. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Board of Trustees v. Sweeny*, 439 U.S. 24, 25 (1978); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577-78 (1978). Under *McDonnell Douglas*, the plaintiff bears an initial burden of establishing a *prima facie* case of discrimination.[13] If the plaintiff is successful, the *burden of production* shifts to the employer to rebut the plaintiff's *prima facie* showing by articulating "some legitimate, non-discriminatory reason" for its challenged employment decision. *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 254. The plaintiff is then afforded the opportunity "to demonstrate that the proffered reason was not the true reason for the employment decision." *Id.* at 256; *McDonnell Douglas v. Green*, 411 U.S. at 804-05. The burden of establishing that the employer's articulated reason is pretextual merges with the plaintiff's ultimate burden of persuading the trier of

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[13] Proof of discriminatory motive is, of course, critical in disparate treatment cases. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). In this respect, a *McDonnell Douglas prima facie* showing is not the equivalent of a factual finding of intentional discrimination. Rather, it is simply proof of actions taken by the employer from which a discriminatory animus can be inferred "because experience has proved that in the absence of any other explanation it is more likely than not those actions were bottomed on impermissible considerations." *Furnco Construction Corp. v. Waters*, 438 U.S. at 577.

fact that he has been the victim of intentional discrimination. *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 256. And the ultimate burden of persuasion with respect to the issue of discrimination remains at all times with the plaintiff. *Id.* at 253.

Although *McDonnell Douglas* dealt specifically with the allocation of burdens of proof in Title VII cases, as this Court noted in *Furnco Construction Corp. v. Waters*, 438 U.S. 567:

> [T]he method suggested in *McDonnell Douglas* . . . is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.

Id. at 577. Simple logic, as well as the overwhelming weight of lower court authority, supports the application of the same standard to cases alleging age discrimination under the ADEA. *See, e.g., Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014-16 (1st Cir. 1979); *Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914, 920 (2d Cir. 1981); *Smithers v. Bailar*, 629 F.2d 892, 894-95 (3rd Cir. 1980); *Smith v. University of North Carolina*, 632 F.2d 316, 332-33 (4th Cir. 1980); *Marshall v. Westinghouse Electric Corp.*, 576 F.2d 588 (5th Cir. 1978); *Kephart v. Institute of Gas Technology*, 630 F.2d 1217, 1219 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981); *Cova v. Coca-Cola Bottling Co.*, 574 F.2d 958, 959 (8th Cir. 1978); *Sutton v. Atlantic Richfield Co.*, 646 F.2d 407, 411 (9th Cir. 1981); *Kentroti v. Frontier Air Lines, Inc.*, 585 F.2d 967, 969 (10th Cir. 1978); *Krieg v. Paul Revere Life Insurance Co.*, 718 F.2d 998, 999 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 1712 (1984); *Garner v. Boorstin*, 690 F.2d 1034, 1036-37 (D.C. Cir. 1982). As the First Circuit observed in *Loeb v. Textron, Inc.*, 600 F.2d at 1015:

> [W]e see no inherent reason why [the *McDonnell Douglas* analysis] is any less a "sensible, orderly way to evaluate the evidence" in an age discrimination

> case than in any other. *McDonnell Douglas* meets a problem of proof that may be present in any case where motivation is an issue, but does not alter the traditional burdens of proof in civil litigation, and is not intended to deflect the fact-finder from the central issue of whether the employer was motivated by discriminatory factors.

The RFOA instruction in the instant case was inconsistent with the *McDonnell Douglas* standard in at least two critical respects. First, by instructing the jury that Western had the burden of proving "by a preponderance of the evidence" that its refusal to allow Respondents Criswell and Starley to bid down to the position of Second Officer was motivated by "reasonable factors other than age," *Criswell v. Western Air Lines, Inc.*, 709 F.2d 544, 552 (9th Cir. 1983), *cert granted*, 53 U.S.L.W. 3202 (U.S. 1984),[14] the district court improperly placed the burden on Western to prove that *age was not a determining factor*, when under the *McDonnell Douglas* standard it was Respondents' burden at all times to prove that *age was a determining factor*. Moreover, under the *McDonnell Douglas* scheme, affirmative defenses to Respondents' claims of intentional age discrimination could only have come into play after Respondents had demonstrated that the reasons asserted by Western for its challenged employment decisions were pretextual, since only then would Respondents have established age motivated conduct. *See Loeb v. Textron*, 600 F.2d at 1015-16; *Marshall v. Westinghouse Electric Corp.*, 576 F.2d at 590-92.[15] If West-

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[14] Contrary to Respondents' assertions, a plain reading of Jury Instructions 17 (JA 56), 23 (JA 57) and 30 (JA 62-63) clearly shows that the jury was instructed that Western had the burden of proving "by a preponderance of the evidence" that its refusal to allow Respondents Criswell and Starley to bid down to the position of Second Officer was motivated by "reasonable factors other than age." *Criswell v. Western Air Lines, Inc.*, 709 F.2d 544, 552 (9th Cir. 1983), *cert. granted*, 53 U.S.L.W. 3202 (U.S. 1984).

[15] Respondents' contention that "Western did not deny it had taken actions against Respondents because of their age," *see* Re-

ern's assertion that its employment decisions were based on "reasonable factors other than age" is characterized as an affirmative defense, it necessarily follows that the defense would not arise until *after* Respondents had shown that Western's "reasonable factors" were pretextual. Such a conclusion clearly contradicts the teachings of *McDonnell Douglas* and is certainly *not* a "sensible or orderly" way of evaluating evidence in an age discrimination case.[16]

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spondents' Brief at 42-43, is a serious misrepresentation. Western raised two separate defenses to Respondents' age discrimination claims. First, it asserted that its action in denying the downbid requests of Respondents Starley and Criswell was based on "reasonable factors other than age." Alternatively, Western maintained that its policy of prohibiting Second Officers from working past age 60 was a BFOQ. Western was, of course, perfectly free to plead and prove, as it did, alternative and even inconsistent defenses. *See* Fed. R. Civ. P. 8(e). For purposes of its RFOA defense, Western did *not* admit that its actions were in any way based on Respondents' age. To the contrary, Western's reasonable factors other than age evidence was entirely consistent with and in furtherance of its denial of age discrimination.

[16] Respondents' reliance on cases construing the "factors other than sex" exception to the Equal Pay Act, 29 U.S.C. § 206(d)(1) (1982), is simply misplaced. The Equal Pay Act, unlike the ADEA, does not require a showing of discriminatory motive. As this Court stated in *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974), a violation of the Equal Pay Act is established by merely showing that:

> [A]n employer pays different wages to employees of opposite sexes "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."

Id. at 196. Once it has been shown that an employer pays workers of one sex more than workers of the opposite sex for equal work, the burden properly shifts to the employer to show that the wage differential is justified under one of the Act's four exceptions. This view is entirely consistent with the general rule that the application of an exemption under the Fair Labor Standards Act (FLSA) is an affirmative defense on which the employer has the burden of proof. *Id.* In contrast, under the ADEA, proof of discriminatory motive is critical. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). Moreover, although the ADEA incorporates certain procedural provisions of the FLSA, as this Court noted in *Lorillard v. Pons*, 434 U.S. 575, 584 (1978), "the prohibitions of the ADEA were derived *in haec verba* from Title VII," and the general rule concerning exemptions under the FLSA simply does not apply.

Respondents' contention that the district court's improper burden allocation with respect to the RFOA defense was harmless error, because Western had the burden of justifying its downbidding policy under the common law "business necessity" defense in response to a claimed showing of "disparate impact," is incorrect for several reasons. In the first place, this Court has never held that proof of discriminatory impact can establish a violation of the ADEA. *See Markham v. Geller*, 451 U.S. 945, 949 (1981) (Rehnquist, J., dissenting from denial of certiorari).[17] Unlike Title VII, under which this Court created the disparate impact theory of discrimination, the ADEA explicitly exonerates employment decisions based on "reasonable factors other than age." 29 U.S.C. § 623(f)(1) (1982). Thus, the unambiguous language of the statute indicates that where an employment decision is based on reasonable factors other than age, it is permissible even though it might be shown to have a disparate impact on older workers. *See County of Washing-*

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[17] It should be noted that of the seven cases cited by Respondents at page 45 of their brief in support of the proposition that the disparate impact theory has been "uniformly" recognized as applicable to ADEA cases, only four applied a disparate impact theory. Contrary to Respondents' misleading citations, the courts in the remaining cases reserved decision on whether such a theory applies to ADEA cases. *See Akins v. South Central Bell Telephone Co.*, 744 F.2d 1133, 1136 (5th Cir. 1984); *Massarsky v. General Motors Corp.*, 706 F.2d 1011, 1017 (3rd Cir.), *cert. denied*, 104 S. Ct. 348 (1983); *Allison v. Western Union Telegraph Co.*, 680 F.2d 1318, 1322 (11th Cir. 1982). In fact, thus far only three circuit courts have held that proof of discriminatory impact can establish a violation of the ADEA.

ton v. Gunther, 452 U.S. 161 (1981).[18] Second, even if proof that a facially neutral employment policy that has a disparate impact on older workers could establish a violation of the ADEA, there is nothing in the Act or relevant judicial authority which would preclude an employer from asserting an RFOA defense in addition to a "business necessity" defense to a disparate impact claim.

Finally, and perhaps most importantly, there was simply no showing in the instant case that Western's policy against downbidding had a disparate impact on older workers. Although Respondents contended that Western's downbid policy was administered in such a way as to have a disproportionate impact on pilots nearing their sixtieth birthday, by Respondents' own admission, the only evidence offered in support of this contention was that Western had allowed a number of pilots under age 60 to downbid under certain circumstances, while it had refused to permit downbidding by pilots nearing age 60.[19] Assuming for purpose of argument that Respondents' evidence was credited by the jury, it at best showed that Western treated older pilots differently from younger pilots, *i.e.*, disparate treatment. In short, Respondents failed to allege or prove a facially neutral employment practice having a disproportionate impact on older workers. Rather, Respondents alleged and attempted to prove that Western had afforded differential treatment to older and younger pilots with respect to downbidding rights. To find that Respondents' evidence in this case established a disparate impact claim would be the equivalent of the Court having found disparate impact in *Griggs v. Duke Power*

[18] In *Gunther*, this Court suggested that the "factors other than sex" exception to the Equal Pay Act, 29 U.S.C. § 206(d)(1) (1982), is inconsistent with disparate impact claims and is designed to limit that Act to disparate treatment claims. 452 U.S. at 170-71. *See also, Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1079 (D.C. Cir. 1984).

[19] *See* Respondents' Brief at 37.

Co., 401 U.S. 427 (1971), based on a showing that the employment tests challenged in that case had been administered to blacks only. If that had been the showing in *Griggs*, there would have been no reason for this Court to have created the disparate impact theory, since the plaintiffs would have proved a straight-forward case of disparate treatment.

Finally, Respondents' characterization of Western's RFOA defense as the equivalent of a "bona fide seniority system" defense fundamentally misconceives the nature of Western's allegations and proof below. Although Western did assert a bona fide seniority system defense under Section 4(f)(2) of the Act, 29 U.S.C. § 623(f)(2) (1982), based specifically on the Pilots Agreement and the Pilots System Board determination,[20] the RFOA al-

[20] Respondents' contention that Western first raised a bona fide seniority system defense on appeal is not supported by the record. Western raised this defense in its answer and filed a motion for summary judgment on the basis of this defense in February of 1979. That motion was initially granted but later denied on motion for reconsideration (A67-A82). In denying Western's motion for summary judgment, the court found that Western had demonstrated that the Starley and Criswell downbids were improper under the seniority system embodied in the Pilots Agreement. Since there was no suggestion that the pilot seniority system was not bona fide or was a subterfuge to evade the purposes of the ADEA or required or permitted involuntary retirement, judgment should have been entered for Western. 29 U.S.C. § 623(f)(2) (1982). Instead, the trial court treated Western's observance of the terms of the pilot seniority system as a "reasonable factor other than age" which would provide no defense under the ADEA if age was also a determinative factor in Western's decision to deny the requested downbids. Thus, the district court inexplicably combined these two separate defenses with the result that it properly charged the jury on neither. Western continues to maintain that its observance of the pilot seniority system also provides a complete defense to the claims of Starley and Criswell respecting denial of their requested downbids. Certiorari has not been granted on this issue, although a similar issue is currently pending before the Court in *Air Line Pilots Association, International v. Trans World Airlines, Inc.*, 713

leged and proved by Western was a broader policy not to permit downbidding in a manner which would disrupt the natural line of progression from Second Officer to First Officer to Captain. The mere fact that Western's policy was embodied in the Pilots Agreement as part of the pilot seniority system is immaterial to the question whether Western's downbidding policy was a "reasonable factor other than age" justifying its denial of the Starley and Criswell downbids. The fact that Western's policy has, through the collective bargaining process, been incorporated in the pilot seniority system merely means that it may also form the basis for a bona fide seniority system defense under section 4(f)(2).

CONCLUSION

For all of the foregoing reasons, Western respectfully submits that the judgment of the court of appeals should be reversed.

Respectfully submitted,

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F.2d 940 (2d Cir. 1983), *cert. granted sub nom. Trans World Airlines, Inc. v. Thurston*, 104 S. Ct. 1412 (1984), and the result in that case could affect the disposition of the seniority system issue here.